UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Southern Division

JEFF SCHMIDT,

Plaintiff,

v.

AMERICAN INSTITUTE OF PHYSICS,

Defendant.

Civil Action No.: 8:04-cv-3774 (AW)

AUTHORITIES CITED IN DR. JEFF SCHMIDT'S CONFIDENTIAL MEDIATION STATEMENT

Submitted to
Harold Himmelman

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BRENTWOOD ACADEMY v. TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION, ET AL.

No. 99-901

SUPREME COURT OF THE UNITED STATES

531 U.S. 288; 121 S. Ct. 924; 148 L. Ed. 2d 807; 2001 U.S. LEXIS 964; 69 U.S.L.W. 4085; 2001 Cal. Daily Op. Service 1435; 2001 Daily Journal DAR 1793; 2001 Colo. J. C.A.R. 913; 14 Fla. L. Weekly Fed. S 74

October 11, 2000, Argued
February 20, 2001, Decided

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

DISPOSITION: *180 F.3d 758,* reversed and remanded.

LexisNexis(R) Headnotes

SYLLABUS: Respondent not-for-profit athletic association (Association) regulates interscholastic sport among Tennessee public and private high schools. Most of the State's public high schools are members, representing 84% of the Association's membership. School officials make up the voting membership of the Association's governing council and control board, which typically hold meetings during regular school hours. The Association is largely funded by gate receipts. Association staff, although not state employees, may join the state retirement system. The Association sets membership standards and student eligibility rules and has the power to penalize any member school that violates those rules. The State Board of Education (State Board) has long acknowledged the Association's role in regulating interscholastic competition in public schools, and its members sit as nonvoting members of the Association's governing bodies. When the Association penalized petitioner Brentwood Academy for violating a recruiting rule, Brentwood sued the Association and its executive director under *42 U.S.C. § 1983,* claiming that the rule's enforcement was state action that violated the First and Fourteenth Amendments. The District Court granted Brentwood summary judgment, enjoining the rule's enforcement, but the Sixth Circuit found no state action and reversed.

Held: The Association's regulatory activity is state action owing to the pervasive entwinement of state school officials in the Association's structure, there being no offsetting reason to see the Association's acts in any other way. Pp. 5-17.

(a) State action may be found only if there is such a "close nexus between the State and the challenged action" that seemingly private behavior "may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351, 42 L. Ed. 2d 477, 95 S. Ct. 449.* No one fact is a necessary condition for finding state action, nor is any set of circumstances sufficient, for there may be some countervailing reason against attributing activity to the government. The facts that can bear on an attribution's fairness — *e.g.,* a nominally private entity may be a state actor when it is entwined with governmental policies or when government is entwined in its management or control, *Evans v. Newton, 382 U.S. 296, 299, 301, 15 L. Ed. 2d 373, 86 S. Ct. 486* — unequivocally show that a legal entity's character is determined neither by its expressly private characterization in statutory law, nor by the law's failure to acknowledge its inseparability from recognized government officials or agencies. In *National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 102 L. Ed. 2d 469, 109 S. Ct. 454,* this Court anticipated that state action could be found when there is public entwinement in the management or control of an organization whose member public schools are all within a single State. Pp. 6-9.

(b) The necessarily fact-bound inquiry leads to the conclusion of state action here. The Association's nominally private character is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it. To the extent of 84% of its membership, the Association is an organization of public schools represented by their officials acting in their official capacity to provide an integral element of secondary public

schooling, interscholastic athletics. There would be no recognizable Association without the public school officials, who overwhelmingly determine and perform all but the Association's purely ministerial acts. Only the 16% minority of private school memberships keeps the entwinement of the Association and public schools from being total and their identities totally indistinguishable. To complement the entwinement from the bottom up, the State has provided entwinement from the top down: State Board members sit ex officio on the Association's governing bodies and Association employees participate in the state retirement system. Entwinement to the degree shown here requires that the Association be charged with a public character and judged by constitutional standards. Pp. 9–13.

(c) Entwinement is also the answer to the Association's several arguments that the instant facts would not support a state action finding under various other criteria, *e.g.*, the public function test, *Rendell-Baker v. Kohn, 457 U.S. 830, 73 L. Ed. 2d 418, 102 S. Ct. 2764,* distinguished. Pp. 13–15.

(d) Although facts showing public action may be outweighed in the name of a value at odds with finding public accountability in the circumstances, *e.g., Polk County v. Dodson, 454 U.S. 312, 322, 70 L. Ed. 2d 509, 102 S. Ct. 445,* no such countervailing value is present here. The Association's fear that reversing the judgment will trigger an epidemic of federal litigation is unfounded. Save for the Sixth Circuit, every Court of Appeals to consider a statewide athletic association like this one has found it to be a state actor, and there has been no litigation explosion in those jurisdictions. Nor should the Association have dispensation merely because the public schools themselves are state actors subject to suit under § 1983 and Title IX of the Education Amendments of 1972. Pp. 15–16.

180 F.3d 758, reversed and remanded.

COUNSEL:

James F. Blumstein argued the cause for petitioner.

Barbara D. Underwood argued the cause for the United States, as amicus curiae, by special leave of court.

Richard L. Colbert argued the cause for respondents.

JUDGES: SOUTER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which REHHQUIST, C. J., and SCALIA and KENNEDY, JJ., joined.

OPINIONBY: SOUTER

OPINION: [**927] [***814] [*290]

JUSTICE SOUTER delivered the opinion of the Court.

[***LEdHR1A] [1A] [***LEdHR2A] [2A] [***LEdHR3A] [3A]The issue is whether a statewide association incorporated to regulate interscholastic athletic competition among public and private secondary schools may be regarded as engaging in state action when it enforces a rule against a member school. The association in question here includes most public schools located within the State, acts through their representatives, draws its officers from them, is largely funded

[*291] by their dues and income received in their stead, and has historically been seen to regulate in lieu of the State Board of Education's exercise of its own authority. We hold that the association's regulatory activity may and should be treated as state action owing to the pervasive entwinement of state school officials in the structure of the association, there being [**928] no offsetting reason to see the association's acts in any other way.

I

Respondent Tennessee Secondary School Athletic Association (Association) is a not-for-profit membership corporation organized to regulate interscholastic sport among the public and private high schools in Tennessee that belong to it. No school is forced to join, but without any other authority actually regulating interscholastic athletics, it enjoys the memberships of almost all the State's public high schools (some 290 of them or 84% of the Association's voting membership), far outnumbering the 55 private schools that belong. A member school's team may play or scrimmage only against the team of another member, absent a dispensation.

The Association's rulemaking arm is its legislative council, while its board of control tends to administration. The voting membership of each of these nine-person committees is limited under the Association's bylaws to high school principals, assistant principals, and superintendents elected by the member schools, and the public school administrators who so serve typically attend meetings during regular school hours. Although the Association's staff members are not paid by the State, they are eligible to join the State's public retirement system for its employees. Member schools pay dues to the Association, though the bulk of its revenue is gate receipts at member teams' football and basketball tournaments, many of them held in public arenas rented by the Association.

The constitution, bylaws, and rules of the Association set standards of school membership and the eligibility of students to play in interscholastic games. Each school, for

[*292] example, is regulated in awarding financial aid, most coaches must have a Tennessee state teaching license, and players must meet minimum academic standards and hew to limits on student employment. Under the bylaws, "in all matters pertaining to the athletic relations of his school," App. 138, the principal is responsible to the Association, which has the power "to suspend, to fine, or otherwise penalize any member school for the violation of any of the rules of the Association or for other just cause," id. at 100.

Ever since the Association was incorporated in 1925, Tennessee's State Board of Education (State Board) has (to use its own words) [***815] acknowledged the corporation's functions "in providing standards, rules and regulations for interscholastic competition in the public schools of Tennessee," id. at 211. More recently, the State Board cited its statutory authority, *Tenn. Code Ann. § 49-1-302* (App. 220), when it adopted language expressing the relationship between the Association and the Board. Specifically, in 1972, it went so far as to adopt a rule expressly "designating" the Association as "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools in Tennessee participate on an interscholastic basis." Tennessee State Board of Education, Administrative Rules and Regulations, Rule 0520-1-2-.26 (1972) (later moved to Rule 0520-1-2-.08). The Rule provided that "the authority granted herein shall remain in effect until revoked" and instructed the State Board's chairman to "designate a person or persons to serve in an ex-officio capacity on the [Association's governing bodies]." App. 211. That same year, the State Board specifically approved the Association's rules and regulations, while reserving the right to review future changes. Thus, on several occasions over the next 20 years, the State Board reviewed, approved, or reaffirmed its approval of the recruiting Rule at issue in this case. In 1996, however, the State Board dropped the original Rule 0520-1-2-.08 expressly designating the Association

[*293] as regulator; it substituted a statement "recognizing the value of participation in interscholastic athletics and the role of [the Association] in coordinating [**929] interscholastic athletic competition," while "authorizing the public schools of the state to voluntarily maintain membership in [the Association]." Id. at 220.

The action before us responds to a 1997 regulatory enforcement proceeding brought against petitioner, Brentwood Academy, a private parochial high school member of the Association. The Association's board of control found that Brentwood violated a rule prohibiting "undue influence" in recruiting athletes, when it wrote to incoming students and their parents about spring football practice. The Association accordingly placed Brentwood's athletic program on probation for four years, declared its football and boys' basketball teams ineligible to compete in playoffs for two years, and imposed a $3,000 fine. When these penalties were imposed, all the voting members of the board of control and legislative council were public school administrators.

Brentwood sued the Association and its executive director in federal court under Rev. Stat. § 1979, *42 U.S.C. § 1983,* claiming that enforcement of the Rule was state action and a violation of the First and Fourteenth Amendments. The District Court entered summary judgment for Brentwood and enjoined the Association from enforcing the *Rule. 13 F. Supp. 2d 670 (MD Tenn. 1998).* In holding the Association to be a state actor under § 1983 and the Fourteenth Amendment, the District Court found that the State had delegated authority over high school athletics to the Association, characterized the relationship between the Association and its public school members as symbiotic, and emphasized the predominantly public character of the Association's membership and leadership. The [***816] court relied on language in *National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 193, n. 13, 102 L. Ed. 2d 469, 109 S. Ct. 454 (1988),* suggesting that statewide interscholastic athletic associations are state actors, and on other federal cases

[*294] in which such organizations had uniformly been held to be acting under color of state law.

The United States Court of Appeals for the Sixth Circuit reversed. *180 F.3d 758 (1999)*. It recognized that there is no single test to identify state actions and state actors but applied three criteria derived from *Blum v. Yaretsky, 457 U.S. 991, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982), Lugar v. Edmondson Oil Co., 457 U.S. 922, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982),* and *Rendell-Baker v. Kohn, 457 U.S. 830, 73 L. Ed. 2d 418, 102 S. Ct. 2764 (1982),* and found no state action under any of them. It said the District Court was mistaken in seeing a symbiotic relationship between the State and the Association, it emphasized that the Association was neither engaging in a traditional and exclusive public function nor responding to state compulsion, and it gave short shrift to the language from *Tarkanian* on which the District Court relied. Rehearing en banc was later denied over the dissent of two judges, who criticized the panel decision for creating a conflict among state and federal courts, for being inconsistent with *Tarkanian*, and for lacking support in the "functional" analysis of private activity required by *West v. Atkins, 487 U.S. 42, 101 L. Ed. 2d 40, 108 S. Ct. 2250 (1988),* for assessing the significance of cooperation between public officials and a private actor. *190 F.3d 705 (CA6 1999)* (Merritt, J., dissenting from denial of rehearing en banc).

We granted certiorari, *528 U.S. 1153 (2000),* to resolve the conflict n1 and now reverse.

n1 A number of other courts have held statewide athletic associations to be state actors. *Griffin High School v. Illinois High School Assn., 822 F.2d 671, 674 (CA7 1987); Clark v. Arizona Interscholastic Assn., 695 F.2d 1126, 1128 (CA9 1982),* cert. denied, *464 U.S. 818, 78 L. Ed. 2d 90, 104 S. Ct. 79 (1983); In re United States ex rel. Missouri State High School Activities Assn., 682 F.2d 147, 151 (CA8 1982); Louisiana High School Athletic Assn. v. St. Augustine High School, 396 F.2d 224, 227-228 (CA5 1968); Oklahoma High School Athletic Assn. v. Bray, 321 F.2d 269, 272-273 (CA10 1963); Indiana High School Athletic Assn. v. Carlberg, 694 N.E.2d 222, 229 (Ind. 1997); Mississippi High Sch. Activities Ass'n v. Coleman, 631 So. 2d 768, 774-775 (Miss. 1994); Kleczek v. Rhode Island Interscholastic League, Inc., 612 A.2d 734, 736 (R. I. 1992);* see also *Moreland v. Western Penn. Interscholastic Athletic League, 572 F.2d 121, 125 (CA3 1978)* (state action conceded).

[*295] [**930]

II

A

[***LEdHR4A] [4A] [***LEdHR5A] [5A]Our cases try to plot a line between state action subject to Fourteenth Amendment scrutiny and private conduct (however exceptionable) that is not. *Tarkanian, supra, 488 U.S. at 191; Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974).* The judicial obligation is not only to "'preserve an area of individual freedom by limiting the reach of federal law' and avoid the imposition of responsibility on a State for conduct it could not control," *Tarkanian, supra, 488 U.S. at 191* (quoting *Lugar, supra, at 936–937),* but also to assure that constitutional standards are invoked "when it can be said that the State is *responsible* for the specific [***817] conduct of which the plaintiff complains," *Blum, supra, at 1004* (emphasis in original). If the Fourteenth Amendment is not to be displaced, therefore, its ambit cannot be a simple line between States and people operating outside formally governmental organizations, and the deed of an ostensibly private organization or individual is to be treated sometimes as if a State had caused it to be performed. Thus, we say that state action may be found if, though only if, there is such a "close nexus between the State and the challenged action" that seemingly private behavior "may be fairly treated as that of the State itself." *Jackson, supra, at 351.* n2

[***LEdHR5B] [5B]

n2 If a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, the conduct also constitutes action "under color of state law" for § 1983 purposes. *Lugar v. Edmondson Oil Co., 457 U.S. 922, 935, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982).*

[***LEdHR4B] [4B]What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity. From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some

[*296] countervailing reason against attributing activity to the government. See *Tarkanian, 488 U.S. at 193, 196; Polk County v. Dodson, 454 U.S. 312, 70 L. Ed. 2d 509, 102 S. Ct. 445 (1981).*

Our cases have identified a host of facts that can bear on the fairness of such an attribution. We have, for example, held that a challenged activity may be state action when it results from the State's exercise of "coercive power," *Blum, 457 U.S. at 1004,* when the State provides "significant encouragement, either overt or covert," *ibid.* or when a private actor operates as a "willful participant in joint activity with the State or its agents," *Lugar, supra, at 941* (internal quotation marks omitted). We have treated a nominally private entity as a state actor when it is controlled by an "agency of the State," *Pennsylvania v. Board of Directors of City Trusts of Philadelphia, 353 U.S. 230, 231, 1 L. Ed. 2d 792, 77 S. Ct. 806 (1957) (per curiam)*, when it has been delegated a public function by the State, cf., *e.g., West v. Atkins, supra, at 56; Edmonson v. Leesville Concrete Co., 500 U.S. 614, 627-628, 114 L. Ed. 2d 660, 111 S. Ct. 2077 (1991),* when it is "entwined with governmental policies" or when government is "entwined in [its] management or control," *Evans v. Newton, 382 U.S. 296, 299, 301, 15 L. Ed. 2d 373, 86 S. Ct. 486 (1966).*

[***LEdHR6] [6]Amidst such variety, examples may be the best teachers, and examples from [**931] our cases are unequivocal in showing that the character of a legal entity is determined neither by its expressly private characterization in statutory law, nor by the failure of the law to acknowledge the entity's inseparability from recognized government officials or agencies. *Lebron v. National Railroad Passenger Corporation, 513 U.S. 374, 130 L. Ed. 2d 902, 115 S. Ct. 961 (1995),* held that Amtrak was the Government for constitutional purposes, regardless of its congressional designation as private; it was organized [***818] under federal law to attain governmental objectives and was directed and controlled by federal appointees. *Pennsylvania v. Board of Directors of City Trusts of Philadelphia, supra,* held the privately endowed Gerard College to be a state actor and enforcement of its private founder's limitation of admission

[*297] to whites attributable to the State, because, consistent with the terms of the settlor's gift, the college's board of directors was a state agency established by state law. Ostensibly the converse situation occurred in *Evans v. Newton, supra,* which held that private trustees to whom a city had transferred a park were nonetheless state actors barred from enforcing racial segregation, since the park served the public purpose of providing community recreation, and "the municipality remained entwined in [its] management [and] control," *id. at 301.*

These examples of public entwinement in the management and control of ostensibly separate trusts or corporations foreshadow this case, as this Court itself anticipated in *Tarkanian, supra. Tarkanian* arose when an undoubtedly state actor, the University of Nevada, suspended its basketball coach, Tarkanian, in order to comply with rules and recommendations of the National Collegiate Athletic Association (NCAA). The coach charged the NCAA with state action, arguing that the state university had delegated its own functions to the NCAA, clothing the latter with authority to make and apply the university's rules, the result being joint action making the NCAA a state actor.

To be sure, it is not the strict holding in *Tarkanian* that points to our view of this case, for we found no state action on the part of the NCAA. We could see, on the one hand, that the university had some part in setting the NCAA's rules, and the Supreme Court of Nevada had gone so far as to hold that the NCAA had been delegated the university's traditionally exclusive public authority over personnel. *Id. at 190.* But on the other side, the NCAA's policies were shaped not by the University of Nevada alone, but by several hundred member institutions, most of them having no connection with Nevada, and exhibiting no color of Nevada law. *Id. at 193.* Since it was difficult to see the NCAA, not as a collective membership, but as surrogate for the one State, we held the organization's connection with Nevada

[*298] too insubstantial to ground a state action claim. *Id. at 193, 196.*

But dictum in *Tarkanian* pointed to a contrary result on facts like ours, with an organization whose member public schools are all within a single State. "The situation would, of course, be different if the [Association's] membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign." *Id. at 193, n. 13.* To support our surmise, we approvingly cited two cases: *Clark v. Arizona Interscholastic Assn., 695 F.2d 1126 (CA9 1982),* cert. denied, *464 U.S. 818, 78 L. Ed. 2d 90, 104 S. Ct. 79 (1983),* a challenge to a state high school athletic association that kept boys from playing on girls' interscholastic volleyball teams in Arizona; and *Louisiana High School Athletic Assn. v. St. Augustine High School, 396 F.2d 224* [***819] *(CA5 1968),* a parochial school's attack on the racially segregated system of interscholastic high school athletics maintained by the athletic association. In each instance, the [**932] Court of Appeals treated the athletic association as a state actor.

B

[***LEdHR1B] [1B]Just as we foresaw in *Tarkanian*, the "necessarily fact-bound inquiry," *Lugar, 457 U.S. at 939,* leads to the conclusion of state action here. The nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it.

The Association is not an organization of natural persons acting on their own, but of schools, and of public schools to the extent of 84% of the total. Under the Association's bylaws, each member school is represented by its principal or a faculty member, who has a vote in selecting members of the governing legislative council and board of control from eligible principals, assistant principals and superintendents.

[*299]

Although the findings and prior opinions in this case include no express conclusion of law that public school officials act within the scope of their duties when they represent their institutions, no other view would be rational, the official nature of their involvement being shown in any number of ways. Interscholastic athletics obviously play an integral part in the public education of Tennessee, where nearly every public high school spends money on competitions among schools. Since a pickup system of interscholastic games would not do, these public teams need some mechanism to produce rules and regulate competition. The mechanism is an organization overwhelmingly composed of public school officials who select representatives (all of them public officials at the time in question here), who in turn adopt and enforce the rules that make the system work. Thus, by giving these jobs to the Association, the 290 public schools of Tennessee belonging to it can sensibly be seen as exercising their own authority to meet their own responsibilities. Unsurprisingly, then, the record indicates that half the council or board meetings documented here were held during official school hours, and that public schools have largely provided for the Association's financial support. A small portion of the Association's revenue comes from membership dues paid by the schools, and the principal part from gate receipts at tournaments among the member schools. Unlike mere public buyers of contract services, whose payments for services rendered do not convert the service providers into public actors, see *Rendell-Baker, 457 U.S. at 839-843,* the schools here obtain membership in the service organization and give up sources of their own income to their collective association. The Association thus exercises the authority of the predominantly public schools to charge for admission to their games; the Association does not receive this money from the schools, but enjoys the schools' moneymaking capacity as its own.

[***LEdHR2B] [2B]In sum, to the extent of 84% of its membership, the Association is an organization of public schools represented by their

[*300] officials acting [***820] in their official capacity to provide an integral element of secondary public schooling. There would be no recognizable Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions in practical terms. Only the 16% minority of private school memberships prevents this entwinement of the Association and the public school system from being total and their identities totally indistinguishable.

To complement the entwinement of public school officials with the Association from the bottom up, the State of Tennessee has provided for entwinement from top down. State Board members are assigned ex officio to serve as members of the board of control and legislative council, and the [**933] Association's ministerial employees are treated as state employees to the extent of being eligible for membership in the state retirement system.

It is, of course, true that the time is long past when the close relationship between the surrogate association and its public members and public officials acting as such was attested frankly. As mentioned, the terms of the State Board's Rule expressly designating the Association as regulator of interscholastic athletics in public schools was deleted in 1996, the year after a Federal District Court held that the Association was a state actor because its rules were "caused, directed and controlled by the Tennessee Board of Education," *Graham v. TSSAA, 1995 U.S. Dist. LEXIS 3211,* No. 1:95-*CV-044, 1995 WL 115890,* *5 (ED Tenn., Feb. 20, 1995). n3

n3 The District Court in *Graham* held that "this delegation of authority to TSSAA by Tennessee, standing alone, is sufficient to make TSSAA a state actor" under the "state compulsion test," which it understood to provide that a State could exercise such coercive power or provide such significant encouragement, either overt or covert, that the choice of the private actor must be deemed to be that of the State as a matter of law. *1995 U.S. Dist. LEXIS 3211, 1995 WL 115890,* at *4-*5 (citing *Blum v. Yaretsky, 457 U.S. 991, 1004, 73 L. Ed. 2d 5341, 102 S. Ct. 2777 (1982)).*

[***LEdHR2C] [2C] [***LEdHR7A] [7A]

[*301] But the removal of the designation language from Rule 0520-1-2-.08 affected nothing but words. Today the State Board's member-designees continue to sit on the Association's committees as nonvoting members, and the State continues to welcome Association employees in its retirement scheme. The close relationship is confirmed by the Association's enforcement of the same preamendment rules and regulations reviewed and approved by the State Board (including the recruiting Rule challenged by Brentwood), and by the State Board's continued willingness to allow students to satisfy its physical education requirement by taking part in interscholastic athletics sponsored by the Association. The most one can say on the evidence is that the State Board once freely acknowledged the Association's official character but now does it by winks and nods. n4 The amendment to the Rule in 1996 [***821] affected candor but not the "momentum" of the Association's prior involvement with the State Board. *Evans v. Newton, 382 U.S. at 301.* The District Court spoke to this point in finding that because of "custom and

[*302] practice," "the conduct of the parties has not materially changed" since 1996, "the connections between TSSAA and the State [being] still pervasive and entwined." *13 F. Supp. 2d at 681.*

[***LEdHR7B] [7B]

n4 The significance of winks and nods in state-action doctrine seems to be one of the points of the dissenters' departure from the rest of the Court. In drawing the public-private action line, the dissenters would emphasize the formal clarity of the legislative action providing for the appointment of Gerard College's trustees, see *supra,* at , *post,* at , in preference to our reliance on the practical certainty in this case that public officials will control operation of the Association under its bylaws. Similarly, the dissenters stress the express formality of the special statute defining Amtrak's ties to the Government, see *supra,* at , *post,* at , in contrast to the reality in this case that the Association's organizers structured the Association's relationships to the officialdom of public education. But if formalism were the sine qua non of state action, the doctrine would vanish owing to the ease and inevitability of its evasion, and for just that reason formalism has never been controlling. For example, a criterion of state action like symbiosis (which the dissenters accept, *post,* at) looks not to form but to an underlying reality.

[***LEdHR2D] [2D] [***LEdHR8] [8]The entwinement down from the State Board is therefore unmistakable, just as the entwinement up from the member public schools is overwhelming. Entwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards; entwinement to the degree shown here requires it.

C

Entwinement is also the answer to the Association's several arguments offered to [**934] persuade us that the facts would not support a finding of state action under various criteria applied in other cases. These arguments are beside the point, simply because the facts justify a conclusion of state action under the criterion of entwinement, a conclusion in no sense unsettled merely because other criteria of state action may not be satisfied by the same facts.

[***LEdHR9] [9]The Association places great stress, for example, on the application of a public function test, as exemplified in *Rendell-Baker v. Kohn, 457 U.S. 830, 73 L. Ed. 2d 418, 102 S. Ct. 2764 (1982).* There, an apparently private school provided education for students whose special needs made it difficult for them to finish high school. The record, however, failed to show any tradition of providing public special education to students unable to cope with a regular school, who had historically been cared for (or ignored) according to private choice. It was true that various public school districts had adopted the practice of referring students to the school and paying their tuition, and no one disputed that providing the instruction aimed at a proper public objective and conferred a public benefit. But we held that the performance of such a public function did not permit a finding of state action on the part of the school unless the function performed was exclusively and traditionally

[*303] public, as it was not in that case. The Association argues that application of the public function criterion would produce the same result here, and we will assume, *arguendo,* that it would. But this case does not turn on a public function test, any more than *Rendell-Baker* had anything to do with entwinement of public officials in the special school.

[***LEdHR10] [10] [***LEdHR11] [11]For the same reason, it avails the Association nothing to stress that the State neither coerced nor encouraged the actions complained of. "Coercion" and "encouragement" are like "entwinement" in [***822] referring to kinds of facts that can justify characterizing an ostensibly private action as public instead. Facts that address any of these criteria are significant, but no one criterion must necessarily be applied. When, therefore, the relevant facts show pervasive entwinement to the point of largely overlapping identity, the implication of state action is not affected by pointing out that the facts might not loom large under a different test.

D

[***LEdHR12] [12] [***LEdHR13] [13]This is not to say that all of the Association's arguments are rendered beside the point by the public officials' involvement in the Association, for after application of the entwinement criterion, or any other, there is a further potential issue, and the Association raises it. Even facts that suffice to show public action (or, standing alone, would require such a finding) may be outweighed in the name of some value at odds with finding public accountability in the circumstances. In *Polk County, 454 U.S. at 322,* a defense lawyer's actions were deemed private even though she was employed by the county and was acting within the scope of her duty as a public defender. Full-time public employment would be conclusive of state action for some purposes, see *West v. Atkins, 487 U.S. at 50,* accord, *Lugar, 457 U.S. at 935, n. 18,* but not when the employee is doing a defense lawyer's primary job; then, the public defender does "not act on behalf of the State; he is the State's adversary." *Polk County, supra, at*

[*304] *323, n.13.* The state-action doctrine does not convert opponents into virtual agents.

[***LEdHR3B] [3B]The assertion of such a countervailing value is the nub of each of the Association's two remaining arguments, neither of which, however, persuades us. The Association suggests, first, that reversing the judgment here will somehow trigger an epidemic of unprecedented federal litigation. Brief for Respondents 35. Even if that might be counted as a good reason for a *Polk County* decision to call the Association's [**935] action private, the record raises no reason for alarm here. Save for the Sixth Circuit, every Court of Appeals to consider a statewide athletic association like the one here has found it a state actor. This majority view began taking shape even before *Tarkanian*, which cited two such decisions approvingly, see *supra*, at 9, (and this was six years after *Blum*, *Rendell-Baker*, and *Lugar*, on which the Sixth Circuit relied here). No one, however, has pointed to any explosion of § 1983 cases against interscholastic athletic associations in the affected jurisdictions. Not to put too fine a point on it, two District Courts in Tennessee have previously held the Association itself to be a state actor, see *Graham, 1995 U.S. Dist. LEXIS 3211, 1995 WL 115890,* at *5; *Crocker v. Tennessee Secondary School Athletic Assn., 735 F. Supp. 753 (MD Tenn. 1990),* affirmance order, *908 F.2d 972, 973 (CA6 1990),* but there is no evident wave of litigation working its way across the State. A reversal of the judgment here portends nothing more than the harmony of an outlying Circuit with precedent otherwise uniform.

Nor do we think there is anything to be said for the Association's contention that there is no need to treat [***823] it as a state actor since any public school applying the Association's rules is itself subject to suit under § 1983 or Title IX of the Education Amendments of 1972, 86 Stat. 373, *20 U.S.C. §§ 1681*-1688. Brief for Respondents 30. If Brentwood's claim were pushing at the edge of the class of possible defendant state actors, an argument about the social utility of expanding

[*305] that class would at least be on point, but because we are nowhere near the margin in this case, the Association is really asking for nothing less than a dispensation for itself. Its position boils down to saying that the Association should not be dressed in state clothes because other, concededly public actors are; that Brentwood should be kept out of court because a different plaintiff raising a different claim in a different case may find the courthouse open. Pleas for special treatment are hard to sell, although saying that does not, of course, imply anything about the merits of Brentwood's complaint; the issue here is merely whether Brentwood properly names the Association as a § 1983 defendant, not whether it should win on its claim.

The judgment of the Court of Appeals for the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

DISSENTBY: THOMAS

DISSENT:

JUSTICE THOMAS, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY join, dissenting.

We have never found state action based upon mere "entwinement." Until today, we have found a private organization's acts to constitute state action only when the organization performed a public function; was created, coerced, or encouraged by the government; or acted in a symbiotic relationship with the government. The majority's holding — that the Tennessee Secondary School Athletic Association's (TSSAA) enforcement of its recruiting rule is state action — not only extends state-action doctrine beyond its permissible limits but also encroaches upon the realm of individual freedom that the doctrine was meant to protect. I respectfully dissent.

I

Like the state-action requirement of the Fourteenth Amendment, the state-action element of *42 U.S.C. § 1983* excludes from its coverage "merely private conduct, however

[*306] discriminatory or wrongful." *American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50, 143 L. Ed. 2d 130, 119 S. Ct. 977 (1999)* (internal quotation marks omitted). "Careful adherence to the 'state action' requirement" thus "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmondson Oil Co., 457 U.S. 922, 936, 73 L. Ed. 2d 482, 102 S. Ct. 2744* [**936] *(1982)*. The state-action doctrine also promotes important values of federalism, "avoiding the imposition of responsibility on a State for conduct it could not control." *National Collegiate Athletic Assn. v. Tarkanian, 488 U.S. 179, 191, 102 L. Ed. 2d 469, 109 S. Ct. 454 (1988)*. Although we have used many different tests to identify state action, they all have a common purpose. Our goal in every case is to [***824] determine whether an action "can fairly be attributed to the State." *Blum v. Yaretsky, 457 U.S. 991, 1004, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982); American Mfrs., supra, at 52.*

A

Regardless of these various tests for state action, common sense dictates that the TSSAA's actions cannot fairly be attributed to the State, and thus cannot constitute state action. The TSSAA was formed in 1925 as a private corporation to organize interscholastic athletics and to sponsor tournaments among its member schools. Any private or public secondary school may join the TSSAA by signing a contract agreeing to comply with its rules and decisions. Although public schools currently compose 84% of the TSSAA's membership, the TSSAA does not require that public schools constitute a set percentage of its membership, and, indeed, no public school need join the TSSAA. The TSSAA's rules are enforced not by a state agency but by its own board of control, which comprises high school principals, assistant principals, and superintendents, none of whom must work at a public school. Of course, at the time the recruiting rule was enforced in this case, all of the board members happened to be public school officials. However, each board member acts in

[*307] a representative capacity on behalf of all the private and public schools in his region of Tennessee, and not simply his individual school.

The State of Tennessee did not create the TSSAA. The State does not fund the TSSAA and does not pay its employees. n1 In fact, only 4% of the TSSAA's revenue comes from the dues paid by member schools; the bulk of its operating budget is derived from gate receipts at tournaments it sponsors. The State does not permit the TSSAA to use state-owned facilities for a discounted fee, and it does not exempt the TSSAA from state taxation. No Tennessee law authorizes the State to coordinate interscholastic athletics or empowers another entity to organize interscholastic athletics on behalf of the State. n2 The only [**937] state pronouncement acknowledging

[*308] the TSSAA's existence is a rule providing that the [***825] State Board of Education permits public schools to maintain membership in the TSSAA if they so choose. n3

n1 Although the TSSAA's employees, who typically are retired teachers, are allowed to participate in the state retirement system, the State does not pay any portion of the employer contribution for them. The TSSAA is one of three private associations, along with the Tennessee Education Association and the Tennessee School Boards Association, whose employees are statutorily permitted to participate in the state retirement system. *Tenn. Code Ann. § 8-35-118* (1993).

n2 The first formal state acknowledgement of the TSSAA's existence did not occur until 1972, when the State Board of Education passed a resolution stating that it "recognizes and designates [the TSSAA] as the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate in on an interscholastic basis." App. 211. There is no indication that the TSSAA invited this resolution or that the resolution in any way altered the actions of the TSSAA or the State following its adoption in 1972. In fact, it appears that the resolution was not entirely accurate: The TSSAA does not supervise or regulate regular season interscholastic contests. In any event, the resolution was revoked in 1996. Contrary to the majority's reference to its revocation as being "winks and nods," *ante*, at 12, the repeal of the 1972 resolution appears to have had no more impact on the TSSAA's operation than did its passage.

The majority also cites this resolution to support its assertion that "ever since the Association was incorporated in 1925, Tennessee's State Board of Education . . . has acknowledged the corporation's function 'in providing standards, rules and regulations for interscholastic competition in the public schools of Tennessee.'" *Ante*, at 3. However, there is no evidence in the record that suggests that the State of Tennessee or the State Board of Education had any involvement or interest in the TSSAA prior to 1972.

n3 The rule provides: "The State Board of Education recognizes the value of participation in interscholastic athletics and the role of the Tennessee Secondary School Athletic Association in coordinating interscholastic athletic competition. The State Board of Education authorizes the public schools of the state to voluntarily maintain membership in the Tennessee Secondary School Athletic Association." Tenn. Comp. Rules & Regs. § 0520-1-2-.08(1) (2000).

Moreover, the State of Tennessee has never had any involvement in the particular action taken by the TSSAA in this case: the enforcement of the TSSAA's recruiting rule prohibiting members from using "undue influence" on students or their parents or guardians "to secure or to retain a student for athletic purposes." App. 115. There is no indication that the State has ever had any interest in how schools choose to regulate recruiting. n4 In fact, the TSSAA's authority to enforce its recruiting rule arises solely from the voluntary membership contract that each member school signs, agreeing to conduct its athletics in accordance with the rules and decisions of the TSSAA.

n4 The majority relies on the fact that the TSSAA permits members of the State Board of Education to serve ex officio on its board of control to support its "top-down" theory of state action. But these members are not voting members of the TSSAA's board of control and thus cannot exert any control over its actions.

B

Even approaching the issue in terms of any of the Court's specific state-action tests, the conclusion is the same: The TSSAA's enforcement of its recruiting rule against Brentwood Academy is not state action. In applying these tests,

[*309] courts of course must place the burden of persuasion on the plaintiff, not the defendant, because state action is an element of a § 1983 claim. *American Mfrs., 526 U.S. at 49–50; West v. Atkins, 487 U.S. 42, 48, 101 L. Ed. 2d 40, 108 S. Ct. 2250 (1988).*

The TSSAA has not performed a function that has been "traditionally exclusively reserved to the State." *Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974).* The organization of interscholastic sports is neither a traditional nor an exclusive public function of the States. Widespread organization and administration of interscholastic contests by schools did not begin until the 20th century. See M. Lee, A History of Physical Education and Sports in the U.S.A. 73 (1983) (explaining that what little interscholastic athletics there was in the 19th century "came almost entirely in the closing decade of the century and was largely pupil inspired, pupil controlled, and pupil coached"); id. at 68, 146 (stating that no control of high school sports occurred until 1896, when a group of teachers in Wisconsin set up a committee to control such contests, and pointing out that "it was several years before the idea caught on in other states"). Certainly, in Tennessee, the State did not even show an interest in interscholastic athletics until 47 years after the TSSAA had been in existence and had been orchestrating athletic contests throughout the State. Even then, the [***826] State Board of Education merely acquiesced in the TSSAA's actions and did not assume the role of regulating interscholastic athletics. Cf. *Blum, 457 U.S. at 1004–1005* ("Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives . . ."); see also *Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164–165, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978).* The TSSAA no doubt serves the public, particularly the public schools, but the mere provision of a service to the public does not render such provision a traditional [**938] and exclusive public function. See *Rendell-Baker v. Kohn, 457 U.S. 830, 842, 73 L. Ed. 2d 418, 102 S. Ct. 2764 (1982).*

[*310]

It is also obvious that the TSSAA is not an entity created and controlled by the government for the purpose of fulfilling a government objective, as was Amtrak in *Lebron v. National Railroad Passenger Corporation, 513 U.S. 374, 394, 130 L. Ed. 2d 902, 115 S. Ct. 961 (1995).* See also *Pennsylvania v. Board of Directors of City Trusts of Philadelphia, 353 U.S. 230, 1 L. Ed. 2d 792, 77 S. Ct. 806 (1957) (per curiam)* (holding that a state agency created under state law was a state actor). Indeed, no one claims that the State of Tennessee played any role in the creation of the TSSAA as a private corporation in 1925. The TSSAA was designed to fulfill an objective — the organization of interscholastic athletic tournaments — that the government had not contemplated, much less pursued. And although the board of control currently is composed of public school officials, and although public schools currently account for the majority of the TSSAA's membership, this is not required by the TSSAA's constitution.

In addition, the State of Tennessee has not "exercised coercive power or . . . provided such significant encouragement [to the TSSAA], either overt or covert," *Blum, 457 U.S. at 1004,* that the TSSAA's regulatory activities must in law be deemed to be those of the State. The State has not promulgated any regulations of interscholastic sports, and nothing in the record suggests that the State has encouraged or coerced the TSSAA in enforcing its recruiting rule. To be sure, public schools do provide a small portion of the TSSAA's funding through their membership dues, but no one argues that these dues are somehow conditioned on the TSSAA's enactment and enforcement of recruiting rules. n5

[*311] Likewise, even if the TSSAA were dependent on state funding to the extent of 90%, as was the case in *Blum*, instead of less than 4%, mere financial dependence on the State does not convert the [***827] TSSAA's actions into acts of the State. See *Blum, supra, at 1011; Rendell-Baker, supra, at 840;* see also *Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173, 32 L. Ed. 2d 627, 92 S. Ct. 1965 (1972)* ("The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State . . ."). Furthermore, there is no evidence of "joint participation," *Lugar, 457 U.S. at 941-942,* between the State and the TSSAA in the TSSAA's enforcement of its recruiting rule. The TSSAA's board of control enforces its recruiting rule solely in accordance with the authority granted to it under the contract that each member signs.

n5 The majority emphasizes that public schools joining the TSSAA "give up sources of their own income to their collective association" by allowing the TSSAA "to charge for admission to their games." *Ante*, at 10-11. However, this would be equally true whenever a State contracted with a private entity: The State presumably could provide the same service for profit, if it so chose. In *Rendell-Baker v. Kohn, 457 U.S. 830, 73 L. Ed. 2d 418, 102 S. Ct. 2764 (1982),* for example, the State could have created its own school for students with special needs and charged for admission. Or in *Blum v. Yaretsky, 457 U.S. 991, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982),* the State could have created its own nursing homes and charged individuals to stay there. The ability of a State to make money by performing a service it has chosen to buy from a private entity is hardly an indication that the service provider is a state actor.

Finally, there is no "symbiotic relationship" between the State and the TSSAA. *Moose Lodge, supra, at 175;* cf. *Burton v. Wilmington Parking Authority, 365 U.S. 715, 6 L. Ed. 2d 45, 81 S. Ct. 856 (1961).* Contrary to the majority's assertion, see *ante*, at 10-11, the TSSAA's "fiscal relationship with the State is not different from that of many contractors performing services for the government." *Rendell-Baker, supra, at 843.* [**939] The TSSAA provides a service — the organization of athletic tournaments — in exchange for membership dues and gate fees, just as a vendor could contract with public schools to sell refreshments at school events. Certainly the public school could sell its own refreshments, yet the existence of that option does not transform the service performed by the contractor into a state action. Also, there is no suggestion in this case that, as was the case in *Burton*, the State profits from the TSSAA's decision to enforce its recruiting rule.

[*312] Because I do not believe that the TSSAA's action of enforcing its recruiting rule is fairly attributable to the State of Tennessee, I would affirm.

II

Although the TSSAA's enforcement activities cannot be considered state action as a matter of common sense or under any of this Court's existing theories of state action, the majority presents a new theory. Under this theory, the majority holds that the combination of factors it identifies evidences "entwinement" of the State with the TSSAA, and that such entwinement converts private action into state action. *Ante*, at 7–8. The majority does not define "entwinement," and the meaning of the term is not altogether clear. But whatever this new "entwinement" theory may entail, it lacks any support in our state-action jurisprudence. Although the majority asserts that there are three examples of entwinement analysis in our cases, there is no case in which we have rested a finding of state action on entwinement alone.

Two of the cases on which the majority relies do not even use the word "entwinement." See *Lebron, supra, at 374; City Trusts, supra, at 230. Lebron* concerned the status of Amtrak, a corporation that Congress created and placed under Government control for the specific purpose of achieving a governmental objective [***828] (namely to avert the threatened extinction of passenger train service in the United States). *513 U.S. at 383, 386.* Without discussing any notion of entwinement, we simply held that, when "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." *Id. at 400.* Similarly, in

[*313] *City Trusts*, we did not consider entwinement when we addressed the question whether an agency established by state law was a state actor. See *353 U.S. at 231*. In that case, the Pennsylvania legislature passed a law creating a board of directors to operate a racially segregated school for orphans. *Ibid.* Without mentioning "entwinement," we held that, because the board was a state agency, its actions were attributable to the State. *Ibid.*

The majority's third example, *Evans v. Newton, 382 U.S. 296, 15 L. Ed. 2d 373, 86 S. Ct. 486 (1966)*, lends no more support to an "entwinement" theory than do *Lebron* and *City Trusts*. Although *Evans* at least uses the word "entwined," *382 U.S. at 299* ("Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action"), we did not discuss entwinement as a distinct concept, let alone one sufficient to transform a private entity into a state actor when traditional theories of state action do not. On the contrary, our analysis rested on the recognition that the subject of the dispute, a park, served a "public function," much like a fire department or a police department. *Id. at 302*. A park, we noted, is a "public facility" that "serves the community." *Id. at 301-302*. Even if the city severed all ties to the park and placed its operation in private [**940] hands, the park still would be "municipal in nature," analogous to other public facilities that have given rise to a finding of state action: the streets of a company town in *Marsh v. Alabama, 326 U.S. 501, 90 L. Ed. 265, 66 S. Ct. 276 (1946)*, the elective process in *Terry v. Adams, 345 U.S. 461, 97 L. Ed. 1152, 73 S. Ct. 809 (1953)*, and the transit system in *Public Utilities Comm'n of D. C. v. Pollak, 343 U.S. 451, 96 L. Ed. 1068, 72 S. Ct. 813 (1952). 382 U.S. at 301-302*. Because the park served public functions, the private trustees operating the park were considered to be state actors. n6

n6 We have used the word "entwined" in another case, *Gilmore v. Montgomery, 417 U.S. 556, 565, 41 L. Ed. 2d 304, 94 S. Ct. 2416 (1974)*, which the majority does not cite. In *Gilmore*, we held that a city could not grant exclusive use of public facilities to racially segregated groups. *Id. at 566*. The city, we determined, was "engaged in an elaborate subterfuge" to circumvent a court order desegregating the city's recreational facilities. *Id. at 567*. The grant of exclusive authority was little different from a formal agreement to run a segregated recreational program. *Ibid.* Thus, although we quoted the "entwined" language from *Evans v. Newton, 382 U.S. 296, 15 L. Ed. 2d 373, 86 S. Ct. 486 (1966)*, we were not using the term in the same loose sense the majority uses it today. And there is certainly no suggestion that the TSSAA has structured its recruiting rule specifically to evade review of an activity that previously was deemed to be unconstitutional state action.

[*314]

These cases, therefore, cannot support the majority's "entwinement" [***829] theory. Only *Evans* speaks of entwinement at all, and it does not do so in the same broad sense as does the majority. n7 Moreover, these cases do not suggest that the TSSAA's activities can be considered state action, whether the label for the state-action theory is "entwinement" or anything else.

> n7 The majority's reference to *National Collegiate Athletic Assn. v. Tarkanian, 488 U.S. 179, 102 L. Ed. 2d 469, 109 S. Ct. 454 (1988),* as foreshadowing this case, *ante*, at 8, also does not support its conclusion. Indeed, the reference to *Tarkanian* is ironic because it is not difficult to imagine that application of the majority's entwinement test could change the result reached in that case, so that the National Collegiate Athletic Association's actions could be found to be state action given its large number of public institution members that virtually control the organization.

* * *

Because the majority never defines "entwinement," the scope of its holding is unclear. If we are fortunate, the majority's fact-specific analysis will have little bearing beyond this case. But if the majority's new entwinement test develops in future years, it could affect many organizations that foster activities, enforce rules, and sponsor extracurricular competition among high schools — not just in athletics, but in such diverse areas as agriculture, mathematics, music, marching bands, forensics, and cheerleading. Indeed, this entwinement test may extend to other organizations that are composed of, or controlled by, public officials or public entities, such as firefighters, policemen, teachers, cities, or counties.

[*315] I am not prepared to say that any private organization that permits public entities and public officials to participate acts as the State in anything or everything it does, and our state-action jurisprudence has never reached that far. The state-action doctrine was developed to reach only those actions that are truly attributable to the State, not to subject private citizens to the control of federal courts hearing § 1983 actions.

I respectfully dissent.

REFERENCES: Return To Full Text Opinion

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16B Am Jur 2d, Constitutional Law 924, 926, 927

USCS, Constitution, Amendment 14

L Ed Digest, Constitutional Law 520

L Ed Index, Nonprofit Corporations or Associations; Sports; State Action

Annotation References:

Supreme Court's views as to when person is acting "under color of" state law, within meaning of civil rights statute *(42 USCS 1983)* providing private right of action for violation of federal rights. *101 L Ed 2d 987.*

Supreme Court's views as to applicability, to conduct of private person or entity, of equal protection and due process clauses of the *Fourteenth Amendment. 42 L Ed 2d 922.*

LEXSEE 213 F3D 175

EASTERN SHORE MARKETS, INCORPORATED, Plaintiff-Appellant, v. J.D. ASSOCIATES LIMITED PARTNERSHIP; DORCHESTER CENTER II LIMITED PARTNERSHIP; WWM, INCORPORATED; ERWIN L. GREENBERG DEVELOPMENT CORPORATION II; ERWIN L. GREENBERG & ASSOCIATES, INCORPORATED; G.H. CAMBRIDGE LLC, Defendants-Appellees.

No. 99-1554

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

213 F.3d 175; 2000 U.S. App. LEXIS 11379

March 1, 2000, Argued
May 22, 2000, Decided

PRIOR HISTORY: [**1] Appeal from the United States District Court for the District of Maryland, at Baltimore. Frederic N. Smalkin, District Judge. (CA-98-2994-S).

DISPOSITION: AFFIRMED IN PART, VACATED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.

LexisNexis(R) Headnotes

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ON BRIEF: Timothy L. Mullin, Jr., MILES & STOCKBRIDGE, P.C., Baltimore, Maryland, for Appellant.

Jo Bennett Marsh, MCDANIEL & MARSH, Baltimore, Maryland, for Appellees J.D. Associates, et al.; Charles T. Kimmett, WILLIAMS & CONNOLLY, Washington, D.C., for Appellee G.H. Cambridge.

JUDGES: Before WILKINS, NIEMEYER, and KING, Circuit Judges. Judge Niemeyer wrote the opinion, in which Judge Wilkins and Judge King joined.

OPINIONBY: NIEMEYER

OPINION: [*178] NIEMEYER, Circuit Judge:

Eastern Shore Markets, Inc. sued its shopping center landlord under Maryland law for (1) breach of an express covenant not to interfere with Eastern Shore's reasonable access to its grocery store premises, (2) [**2] breach of an implied covenant to refrain from destructive competition, which allegedly was committed when the landlord introduced a competing grocery store into the shopping center, and (3) related torts. The district court dismissed Eastern Shore's complaint under *Federal Rule of Civil Procedure 12(b)(6)*. For the reasons that follow, we affirm the district court's dismissal of the claim for breach of an express covenant, vacate its dismissal of the remaining claims of the complaint, and remand for further proceedings.

I

Eastern Shore Markets, Inc. ("Eastern Shore"), a Virginia corporation, operates a 28,569-square-foot grocery store in the Dorchester Square Shopping Center in Cambridge, Maryland, on premises leased from J.D. Associates Limited Partnership, formerly known as Dorchester Center Limited Partnership ("J.D. Associates"). The Dorchester Square Shopping Center, a strip mall, was constructed in 1987. The "anchor" at one end of the mall was "JamesWay" department store; the anchor at the other end was designated for a "future department store." Eastern Shore's grocery store and a smaller drug store were located between the anchors, along with other smaller retail stores. Under [**3] the lease between Eastern Shore and J.D. Associates, which provides for an initial term of 20 years, Eastern Shore agreed to pay a base rent plus a "percentage rent" of 1.25% of the store's annual gross sales in excess of $10 million.

Although the lease between Eastern Shore and J.D. Associates does not explicitly give Eastern Shore an exclusive right to be the only grocery store in the shopping

center, the lease does incorporate a site plan that was "approved by the parties." This site plan outlines and labels the premises of each facility in the center, designating the larger spaces for the JamesWay department store (61,420 square feet); a "future department store" (30,000 square feet); Eastern Shore's grocery store (28,569 square feet); and a similarly sized area designated "future retail." The lease also provides that Eastern Shore operate only a "supermarket primarily for sale of food" in the mall and that, if it were to operate another grocery store within a three-mile radius of the mall, it would have to include that store's gross sales "in the computation of the percentage rent" payable to J.D. Associates under the lease.

The lease gives J.D. Associates wide discretion in [**4] the management of the common areas, including parking spaces, which are placed under its "exclusive control and management." The lease provides expressly that J.D. Associates is authorized to

> change the area, level, location and arrangement of the parking areas . . . reduce some by erecting buildings or improvements . . . to close temporarily all or any portion of the parking areas . . . and perform such other acts in and to said areas . . . as, in the use of good business judgment, Landlord shall determine to be advisable with a view to the improvement of the convenience and use thereof by Tenants .. . and [their] customers.

[*179] The lease gives Eastern Shore a revocable license to use the common areas, but the license provides that the common areas may be "diminished" without consequence, "provided reasonable access remains for Tenant, its employees and customers."

The disputes giving rise to Eastern Shore's complaint in this action arose from (1) the construction of a Wal-Mart store in 1995-96 after JamesWay went out of business and J.D. Associates conveyed the "JamesWay" property to Wal-Mart and (2) the competition created by J.D. Associates' sale of the "future department [**5] store" site to a developer who constructed a 52,000 square-foot Metro Food Store, which opened in September 1996. As a consequence of these actions, on August 31, 1998, Eastern Shore commenced this action based on diversity jurisdiction against J.D. Associates, its affiliates, n1 and G.H. Cambridge, LLC, the entity to which J.D. Associates and its affiliates transferred the "future department store" property for the construction of the Metro Food Store.

> n1 J.D. Associates' affiliates include Dorchester Center II Limited Partnership; WWM, Inc.; Erwin L. Greenberg Development Corporation II; and Erwin L. Greenberg & Associates, Inc. The complaint alleges that Erwin L. Greenberg & Associates, Inc. is affiliated with and/or controls WWM, Inc. and Erwin L. Greenberg Development Corporation II. WWM, Inc. is the general partner of J.D. Associates, Inc., and Erwin L. Greenberg Development Corporation II is the general partner of Dorchester Center II Limited Partnership.

Eastern Shore's complaint alleges that during [**6] the construction of the Wal-Mart store on the "JamesWay" property, the east entrance of the shopping center was blocked, requiring Eastern Shore's customers who approached the shopping center on U.S. Route 50 from the east to proceed past the shopping center almost two miles, turn around, and drive back to an entrance accessible only from the eastbound side of U.S. Route 50. Similarly, Eastern Shore alleges that the construction of the Metro Food Store on the "future department store" site resulted in construction trailers and other vehicles being parked directly in front of Eastern Shore's store, obstructing views of the store and denying its customers reasonable access to the store. The complaint also alleges that the parking lot in front of Eastern Shore's store was relined and reconfigured so that the parking spaces "faced" Metro Food Store. In addition, as part of the parking reconfiguration, a concrete island was constructed across the front of Eastern Shore's store. The complaint alleges that these interferences with the common areas breached the explicit terms of the lease by denying Eastern Shore's customers "reasonable access" to the store and by benefiting Metro Food Store [**7] at Eastern Shore's expense.

Eastern Shore's complaint also alleges that, by allowing the construction of a Metro Food Store in competition with Eastern Shore's grocery store, J.D. Associates violated "an implied duty of good faith and fair dealing." It alleges that the defendants constructed a modern, warehouse-style Metro Food Store in excess of 52,000 square feet that "dwarfed" Eastern Shore's much smaller store, introducing destructive competition.

The complaint alleges that the effect of the interference with parking and reasonable access and the competitive activity from Metro Food Store was "devastating," causing the monthly sales at Eastern Shore's store to "plummet[] approximately 30%, thereby threatening the Store's economic viability." Eastern Shore demands $8 million in damages.

In addition to the breach-of-lease claims, the complaint alleges that the affiliates of J.D. Associates and G.H. Cambridge conspired to induce, and indeed induced, J.D. Associates to breach its express and implied obligations under Eastern Shore's lease and that those parties are liable for tortious interference with contract, tortious interference with business relations, and civil conspiracy. [**8]

[*180] The defendants filed two separate motions to dismiss the complaint pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, or in the alternative, relying on submitted affidavits, for summary judgment. The district court refused to rely on the submitted affidavits and dismissed the complaint under Rule 12(b)(6). The court concluded that "Maryland law does not imply a covenant in retail development leases that the developer will not lease space to a competitor of the lessee, even where the rent is partially dependent upon gross sales of the lessee." The court also concluded that under the lease, Eastern Shore could not complain that the reconfiguration of the parking lot during the construction of the Metro Food Store favored Metro Food. It noted that "there is no dispute that customers still could get to and park near [Eastern Shore's grocery store] in a reasonable fashion." Finally, the court dismissed Eastern Shore's complaint arising out of the Wal-Mart construction as time-barred, either by operation of the relevant three-year statute of limitations or by laches.

This appeal followed.

II

In reviewing a district court's order dismissing a complaint under Federal Rule of Civil [**9] Procedure 12(b)(6) for plaintiff's "failure to state a claim upon which relief can be granted," we determine de novo whether the complaint, under the facts alleged and under any facts that could be proved in support of the complaint, is legally sufficient. See *Schatz v. Rosenberg, 943 F.2d 485, 489 (4th Cir. 1991);* see also *Fed. R. Civ. P. 8(a)(2)* (establishing as a pleading requirement that a claim contain "a short and plain statement of the claim showing that the pleader is entitled to relief"). Because only the legal sufficiency of the complaint, and not the facts in support of it, are tested under a Rule 12(b)(6) motion, we assume the truth of all facts alleged in the complaint and the existence of any fact that can be proved, consistent with the complaint's allegations. See *Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984); Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).* While we must take the facts in the light most favorable to the plaintiff, we need not accept the legal conclusions drawn from the facts. See *Schatz, 943 F.2d at 489.* Similarly, [**10] we need not accept as true unwarranted inferences, unreasonable conclusions, or arguments. See generally 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (2d ed. 1990 & 1998 Supp.).

With these standards in hand, we now turn to the complaint at issue in this case.

III

We first address Eastern Shore's claim that J.D. Associates breached express covenants of the lease. Eastern Shore's complaint alleges that J.D. Associates promised in the lease to manage the parking lot so as not to deny Eastern Shore's customers reasonable access to Eastern Shore's store and in a manner beneficial to the store and its customers. Eastern Shore alleges that J.D. Associates breached these express promises in three ways: (1) by allowing the east entrance of the shopping center's parking lot to be blocked during the Wal-Mart construction; (2) by allowing construction vehicles to park in front of its store during the Metro Food Store construction; and (3) by relining and reconfiguring the parking lot to benefit Metro Food Store at Eastern Shore's expense.

The lease, a copy of which was attached to the complaint, grants J.D. Associates discretion to control and manage [**11] the parking lot and the entrances and exits thereto, providing that J.D. Associates "shall have the right from time to time" to "change the area, level, location, and arrangement of parking areas" and "to close temporarily all or any portion of the parking areas or facilities." Moreover, J.D. Associates' conferred

[*181] discretion to close a parking-lot entrance temporarily and to rearrange the parking lot is not limited by any express provision in the lease. In addition, the lease permits J.D. Associates to "reduce [the parking areas and facilities] by erecting buildings or improvements of any kind."

We conclude that these provisions of the lease between Eastern Shore and J.D. Associates give J.D. Associates broad discretion over the management and control of the parking lot and that J.D. Associates' actions in temporarily blocking access to and customers' view of Eastern Shore's store fall within this conferred discretion. We also conclude that the reconfiguration of the parking spaces falls within J.D. Associates' right to "change the area, level, location, and arrangement of parking areas."

Eastern Shore argues that two provisions in the lease limit J.D. Associates' discretion over [**12] the control and management of the parking lot. First, it points to language in the lease that

> Landlord shall have the right to . . . perform such other acts in and to said areas and improvements as, in the use of good business judgment, Landlord shall determine to be advisable with a view to the improvement of the convenience and use thereof by Tenants, their officers, agents, employees and customers.

This provision of the lease, however, does not advance Eastern Shore's argument, because "such other acts" do not include the specified acts of "changing the area, level, location, and arrangement of parking areas," of "closing temporarily all or any portion of the parking areas or facilities," or of reducing the parking area by "erecting buildings or improvements." The right to rearrange the parking lot, temporarily close an entrance thereto, and reduce the size of the lot in connection with the construction of new buildings is expressly and unconditionally reserved by J.D. Associates in the lease and therefore is not covered by the "such other acts" language.

Eastern Shore also seeks support from language in the lease providing that

> if the amount of [common [**13] areas] be diminished, Landlord shall not be subject to any liability nor shall Tenant be entitled to any compensation or diminution or abatement of rent, nor shall diminution of such areas be deemed constructive or actual eviction, provided reasonable access remains for Tenant, its employees and customers.

(Emphasis added). This provision similarly provides no assistance to Eastern Shore, because the language is qualified. The reasonable access provision comes into play only "if the amount of [common areas] be diminished." Eastern Shore does not assert that it was damaged by any diminution in the size of the parking area. Rather, it complains that its customers were denied reasonable access to the store as the result of the temporary blocking of a parking lot entrance, the presence of construction vehicles, and the reconfiguration of the parking lot.

Because the lease expressly gives J.D. Associates the right to take the actions alleged by Eastern Shore in the complaint, the district court properly dismissed Eastern Shore's claim related to these express provisions. n2 Cf. *Schuster v. White Coffee Pot Family Inns, Inc., 43 Md. App. 550, 406 A.2d 452, 453-54 (Md. Ct. Spec. App. 1979)* [**14] (holding that landlord, who promised restaurant nonexclusive use of "all" of a parking area "during the term of the lease," could not eliminate part of restaurant's parking area upon the justification that lease reserved landlord's right "from time to time to

[*182] change the area, location and arrangement of parking areas").

> n2 Eastern Shore also contends that the district court erred in dismissing its claim for the parking-lot obstruction associated with the Wal-Mart construction based on the applicable statute of limitations and laches. Because we have ruled that the complaint in this regard fails to state a claim upon which relief can be granted, we not need reach these limitations and laches questions.

IV

Eastern Shore next contends that the district court erred in dismissing its claim for breach of the lease's implied covenant of good faith and fair dealing. In its complaint, it alleges that (1) its rent in part is calculated as a percentage of its gross sales; (2) the lease prohibits Eastern Shore from using [**15] its premises for any purpose other than a grocery store; (3) J.D. Associates allowed the construction of a "competing Metro Food Store"; and (4) as a result, Eastern Shore suffered "severe injury to its economic and financial interests." It concludes with an allegation that through this conduct, J.D. Associates "directly and materially breached its implied duty of good faith and fair dealing to Eastern Shore."

In its brief on appeal, Eastern Shore alternatively refers to an implied covenant of exclusivity and an implied covenant not to engage in destructive competition, which it claims are aspects of the broader covenant of good faith and fair dealing. It asserts that Maryland law explicitly recognizes a covenant against destructive competition as part of the covenant of good faith and fair dealing and that the covenant against destructive competition is tantamount to an expectation of exclusivity, i.e., the right to be the only grocery store in the shopping center.

The district court treated Eastern Shore's claim as one alleging a breach of an implied covenant of exclusivity and dismissed the complaint on that basis. The court stated:

> In the absence of any direct Maryland [**16] authority implying an exclusivity clause in leases akin to the one in this case, the Court holds that the governing (under Erie[*R. R. Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938)]*) Maryland law bars all claims grounded on the existence of an implied exclusivity clause, which includes the idea that the same result (implied exclusivity) is compelled by the general duty of good faith and fair dealing.

In distinguishing *Automatic Laundry Service, Inc. v. Demas, 216 Md. 544, 141 A.2d 497, 501 (Md. 1958)*, which held that an implied covenant exists under Maryland law not to render a contract valueless by permitting destructive competition, the district court said:

> The Automatic case involved — quite literally — a nickel and-dime concession for coin-operated washing machines in a trailer park — obviously with a location-driven, limited clientele — a matter far different from the complex real estate development lease in this case, which contained an integration clause and spelled out many, many details of the duties and rights of the parties.

A

Maryland law recognizes an implied covenant of good faith [**17] and fair dealing in all negotiated contracts. See , e.g., *Julian v. Christopher, 320 Md. 1, 575 A.2d 735, 739 (Md. 1990); Food Fair Stores, Inc. v. Blumberg, 234 Md. 521, 200 A.2d 166, 173-74 (Md. 1964)* ("In every contract there exists an implied covenant that each of the parties thereto will act in good faith and deal fairly with the others"); cf. *Suburban Hosp., Inc. v. Dwiggins, 324 Md. 294, 596 A.2d 1069, 1076-77 (Md. 1991)* ("Although we have generally implied a covenant of fair dealing in negotiated contracts, there is no implied covenant of fair dealing with regard to termination by either side in an employment-at-will") (footnote omitted). But the covenant of good faith and fair dealing "does not obligate a [party] to take affirmative actions that the party is clearly not required to take under [the contract]." *Parker v. Columbia Bank, 91 Md. App. 346, 604 A.2d 521, 531 (Md. Ct. Spec. App. 1992)* (addressing duty of good faith and fair dealing in contracts between lender and borrower). Rather, the duty "simply prohibits one party to a contract from

[*183] acting in such a manner as to prevent the other [**18] party from performing his obligations under the contract." Id.

Under certain circumstances, the covenant of good faith and fair dealing as recognized in Maryland includes an implied duty to refrain from destructive competition. See *Food Fair, 200 A.2d at 173-74; Automatic Laundry, 141 A.2d at 500-01;* cf. *Dupont Heights Ltd. Partnership v. Riggs Nat'l Bank, 949 F. Supp. 383, 389 & n.3 (D. Md. 1996)* (noting that Automatic Laundry, in recognizing an implied covenant prohibiting destructive competition, addressed contracts involving profit sharing and suggesting that its principles do not apply to other types of contracts). The duty to refrain from destructive competition obligates each party "not to render valueless his contract with [the other party] by permitting . . . destructive competition." *Automatic Laundry, 141 A.2d at 501.*

In Automatic Laundry, a laundry-service company leased several coin-operated washing machines to a trailer park. Under the lease agreement, the laundry service was to install and maintain the machines and to retain 75% of the receipts from the machines, remitting 25% of [**19] the receipts to the trailer park. When the son of the trailer park's owner subsequently installed additional machines at the trailer park and operated them in competition with the leased machines, the laundry service sued, seeking an injunction and damages. The Maryland Court of Appeals found that a duty of loyalty to refrain from destructive competition was implied in the lease agreement and held that the son of the owner of the trailer park could be "properly held accountable . . . for any profits which he may have derived from the improper competition." *141 A.2d at 501.* The court noted that two factors supported the implication of a duty to refrain from destructive competition. First, the parties to the lease agreed to share profits on the basis of gross receipts; second, the laundry service was obligated under the agreement to install enough machines to render adequate service to the trailer park, and did so. The court deduced that the precipitous plunge in the leased machines' earnings upon the installation of the new machines provided evidence that the new machines made performance of the lease agreement impossible. The court quoted 3 Corbin on Contracts § 568, [**20] at 200-01 (1951):

> In any commercial agreement in which the compensation promised by one to the other is a percentage of profits or receipts, or is a royalty on goods sold, manufactured or mined, there will nearly always be found an implied promise of diligent and careful performance in good faith and a forbearance to make performance impossible by going out of business or otherwise.

141 A.2d at 500.

In different circumstances, the Maryland Court of Appeals in Food Fair similarly recognized the covenant of good faith and fair dealing, although it found no breach of the duty when a shopping-center lessee opened additional stores outside of the center that could drain sales from the lessee store. See *200 A.2d at 173-74.* In Food Fair, the lessee grocery store agreed to pay a base rent plus a rent calculated as a percentage of gross sales. After entering into the lease, the grocery store opened additional stores in the area, which the lessor claimed was a breach of the lease's implied covenant of good faith and fair dealing. In determining whether the covenant had been breached, the Maryland court rejected a categorical rule and turned [**21] to "the intention with which the parties entered into the contract of lease, as expressed in the contract, construed in the light of the circumstances in which the contract was made." *200 A.2d at 174.* Declining to impose a duty that would interfere with grocery store's good faith conduct of its business, the court relied on several relevant factors: (1) the lessor did not allege a willful intent on the part of the grocery store to undermine the sales of

[*184] the store; (2) the grocery store did not abandon its business in the shopping center; (3) the grocery store was engaged in a highly competitive business; (4) the lease was quite long and the product of prolonged negotiations; and (5) the lease for the grocery store included a provision for an increased base rent if the store ceased operation.

In short, while the implied duty of good faith and fair dealing as recognized in Maryland requires that one party to a contract not frustrate the other party's performance, it is not understood to interpose new obligations about which the contract is silent, even if inclusion of the obligation is thought to be logical and wise. An implied duty is simply a recognition of conditions [**22] inherent in expressed promises. Thus, if a party promises to pay for its purchase of a business from the profits of a business, inherent in this promise is the agreement that the promisor will exercise reasonable diligence in continuing to conduct the business. See *Automatic Laundry, 141 A.2d at 501.* In the same vein, a promisor who undertakes to distribute products for the promisee impliedly agrees to exercise best efforts, see *Foster-Porter Enterprises v. De Mare, 198 Md. 20, 81 A.2d 325, 332-33 (Md. 1951),* and a promisor who undertakes to exercise judgment on behalf of a promisee impliedly agrees to exercise good judgment, see *Julian, 575 A.2d at 738-39.* Stated otherwise, under the covenant of good faith and fair dealing, a party impliedly promises to refrain from doing anything that will have the effect of injuring or frustrating the right of the other party to receive the fruits of the contract between them. See *Automatic Laundry, 141 A.2d at 500-01; Restatement (Second) of Contracts § 205* (1990); 13 Williston on Contracts , § 38:15, at 437 (2000); cf. Md. Code Ann., Com. Law (U.C.C.) § 1-203.

B [**23]

Eastern Shore claims that three attributes of its lease give rise to either an implied covenant of exclusivity or an implied duty not to engage in competition deliberately destructive of the mutual benefit contemplated by the contract. First, Eastern Shore points to the lease's provision for the calculation of rent based in part on the gross sales made by Eastern Shore. Second, Eastern Shore notes that, under the lease, it agreed to operate only a grocery store on the leased premises. Third, Eastern Shore highlights the shopping-center site plan, which was made part of the lease, and its inclusion of Eastern Shore's store as the only grocery store in the tenant mix. Eastern Shore asserts that these attributes of the lease illustrate the parties' understanding that Eastern Shore's grocery store would be the only grocery store in the shopping center, or, alternatively, that J.D. Associates would not deliberately thwart Eastern Shore's ability to attract customers and be profitable.

To the extent that Eastern Shore alleges a breach of an implied covenant of exclusivity, we agree with the district court that such an allegation fails to state a claim upon which relief can be granted. [**24] A covenant of exclusivity is a valuable benefit for which parties to agreements traditionally bargain and on which they generally either reach or deliberately decide not to reach agreement. Therefore, when parties do not include such a clause in their agreement, we are not free to insert one by implication. Even when the parties include an express restrictive covenant in a deed or lease, under Maryland law the covenant is generally "strictly construed so as to favor the unrestricted use of property." *Maryland Trust Co. v. Tulip Realty Co., 220 Md. 399, 153 A.2d 275, 282 (Md. 1959).* We have found no published opinion in which a court has held that, in Maryland, a restrictive covenant of exclusivity arises out of the implied covenant of good faith and fair dealing.

But this conclusion does not end the analysis in this case. Eastern Shore

[*185] has not limited its complaint to breach of an implied covenant of exclusivity, although it has confusingly styled its arguments to include such a claim. In its arguments, Eastern Shore has treated as interchangeable its claim for breach of a covenant of exclusivity and its claim for breach of an implied covenant against destructive [**25] competition, and it has used both labels to describe aspects of the implied covenant of good faith and fair dealing. Significantly, however, Eastern Shore's complaint, on which our decision must be based, explicitly couches its claim in terms of a breach of the implied covenant of good faith and fair dealing, which Maryland clearly recognizes. Giving the claim its asserted scope, we cannot say that it fails under any probable set of facts to state a claim upon which relief can be granted. Food Fair and Automatic Laundry together establish that, under Maryland law, the intentions of parties as expressed in the lease providing for rent calculated in part as a percentage of sales, combined with the circumstances surrounding the lease's formation, may give rise to an implied covenant to refrain from competition that is destructive to the mutual benefit of the contracting parties. See *Food Fair, 200 A.2d at 173-74; Automatic Laundry, 141 A.2d at 500-01.*

Eastern Shore alleges in its complaint that J.D. Associates willfully undermined its profitability and threatened its viability. It asserts that certain features of its lease agreement contemplate [**26] a particular tenant mix and an important role for its store as the only grocery store within the shopping center. Viewing the complaint in the light most favorable to Eastern Shore, as we are required to do on review of a 12(b)(6) motion, we cannot conclude that Maryland courts would categorically refuse to recognize an implied covenant to refrain from destructive competition in the lease between Eastern Shore and J.D. Associates. We recognize that further proceedings below may reveal facts and defenses counseling against the implication of such a covenant. But without the benefit at this stage of the right to evaluate facts, we conclude that this claim should not have been dismissed under the rigid standards that control the disposition of 12(b)(6) motions. Accordingly, we vacate the judgment as to this claim and remand for further proceedings.

V

Having dismissed Eastern Shore's claims alleging breaches of express and implied covenants of the lease, the district court also dismissed the claims against J.D. Associates' affiliated entities and G.H. Cambridge for tortious interference with contract, tortious interference with business relations, and civil conspiracy. Because we have [**27] recognized a potential claim for breach of the implied covenant of good faith and fair dealing, we must conclude that Eastern Shore's allegations of these torts are legally sufficient.

G.H. Cambridge asserted in its motion to dismiss that Eastern Shore's claims are barred by the doctrine of estoppel and that its actions were protected by a competitive privilege recognized under Maryland law. A Rule 12(b)(6) motion, however, does not generally invite an analysis of potential defenses to the claims asserted in the complaint. See *Brooks v. City of Winston-Salem , 85 F.3d 178, 181 (4th Cir. 1996).* A court may consider defenses on a 12(b)(6) motion only "when the face of the complaint clearly reveals the existence of a meritorious affirmative defense." Id.; see also 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357, at 348-49 (2d ed. 1990). The defense of estoppel derives from specific factual inquiry and its existence is not clearly indicated in Eastern Shore's complaint. G.H. Cambridge's defense of competitive privilege is similarly unsuited for review at this stage of the proceedings, because the existence of that defense [**28] is also not readily apparent from the face of the complaint. Moreover, such a defense would appear to be available

[*186] only where a party induces the breach of an at-will contract. See *Macklin v. Robert Logan Assocs., 334 Md. 287, 639 A.2d 112, 120 (Md. 1994)* ("When the existing contract is not terminable at-will, inducing its breach, even for competitive purposes, is itself improper and, consequently, not 'just cause' for damaging another in his or her business").

Accordingly, we must also vacate the judgment insofar as it dismisses these tort claims.

In sum, we affirm the district court's dismissal of Count I of the complaint, vacate its order dismissing Counts II - V, and remand the case for further proceedings.

AFFIRMED IN PART, VACATED IN PART,

AND REMANDED FOR FURTHER PROCEEDINGS

LEXSEE 1992 US DIST LEXIS 21602

JUDITH FERRAGAMO v. SIGNET BANK/MARYLAND, et al.

Civil Action WN-88-3333

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

1992 U.S. Dist. LEXIS 21602; 59 Fair Empl. Prac. Cas. (BNA) 665; 7 I.E.R. Cas. (BNA) 1158

March 17, 1992, Decided
March 17, 1992, Filed; March 19, 1992, Entered

LexisNexis(R) Headnotes

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JUDGES: Nickerson

OPINIONBY: WILLIAM M. NICKERSON

OPINION:

MEMORANDUM

Now before the Court is Defendants' Motion for Partial Summary Judgment (Paper No. 88). Plaintiff has opposed (Paper No. 96) and Defendants replied (Paper No. 105). Upon a review of the pleadings, the Court determines that no hearing is necessary (Local Rule 105.6), and that Defendants' motion should be granted in part and denied in part.

I. BACKGROUND

Plaintiff Judith Ferragamo ("Ferragamo") was hired by Union Trust Bank as a project manager on January 21, 1982. She obtained her first corporate title in September, 1982, and was promoted to Vice President of Data Center on October 23, 1984. On December 31, 1985, the Bank of Virginia Company acquired Union Trust, creating Signet Bank Corporation ("Signet"), a holding company, and Signet Bank/Maryland and Signet Bank/Virginia

[*2] (collectively, with the other individual named parties, "Defendants").

Ferragamo became pregnant in October of 1986. n1 In January, 1987, she was selected to head up Check Processing and Automated Services in Baltimore. It was at this time that relations between the parties first became strained. n2

n1 A sonogram revealed that the fetus had died in utero. Ferragamo became pregnant again, in March of 1987, and miscarried six weeks later. Ferragamo became pregnant a third time in December of 1987, and carried the baby to term.

n2 Ferragamo claims that upon asking why she was being transferred, the Executive Vice President of Operations told her that she "could not be pregnant and expect to be in a higher position; [that she] would have to choose between a career and family life and this position would be a good transition period for her while she determined whether she wanted a career or family life." Ferragamo Opp. at 11. Defendants denied considering Ferragamo's pregnancy in the decision to transfer.

When

[*3] Ferragamo expressed dissatisfaction with her new job, Signet held meetings with Ferragamo and her attorney, Robert Sapero, to resolve the situation. No settlement was reached. In March of 1987, Ferragamo filed charges with the Equal Employment Opportunity Commission ("EEOC") in Baltimore, alleging sex discrimination.

Relations between the parties rapidly deteriorated. Ferragamo alleges that employees at Signet harassed and humiliated her. She alleges further that Defendants refused to complete her annual performance appraisal. Defendants allege that Ferragamo was insubordinate. On June 29, 1988, a confrontation occurred between Ferragamo and other Signet employees at a management meeting. n3 Ferragamo was placed on ninety days probation.

n3 The parties dispute the events that occurred at this meeting, or at least the interpretation of those events.

On August 9, 1988, Ferragamo requested and received a right to sue letter from the EEOC. She left for maternity leave on August 15, 1988. Defendants state that

[*4] while Ferragamo was on maternity leave a decision was made to terminate her pursuant to a corporate displacement policy. On October 17, 1988, Ferragamo returned from maternity leave and was informed of the Bank's decision. Later that day, Ben Vaughn — Ferragamo's supervisor — met with several management-level employees ("the Vaughn meeting") and told them that Ferragamo had been released. On April 28, 1989, Ferragamo filed a retaliation claim with the Maryland Human Relations Services Commission.

Ferragamo, now proceeding pro se, n4 filed an eleven count Third Amended Complaint with this Court on October 13, 1989. In her complaint, she alleges: (1) Discrimination under Title VII (Count I); (2) Retaliation under Title VII (Count II); (3) Wrongful Discharge under Title VII (Count III); (4) Wrongful or Abusive Discharge (Count IV); (5) Breach of Contract (Count V); (6) Defamation (Count VI); (7) Invasion of Privacy (Count VII); (8) Intentional Infliction of Emotional Distress (Count VIII); (9) Negligent Infliction of Emotional Distress (Count IX); (10) Intentional Interference with a Contract (Count X); and (11) Conspiracy to Deprive Plaintiff of her Civil Rights (Count XI).

[*5] See Third Amended Complaint (Paper No. 35).

n4 Plaintiff was originally represented in this action by Robert Sapero and Joel Segall, of the law firm Sapero & Sapero. Plaintiff's counsel ceased representation on May 29, 1991, see Paper No. 85, and Plaintiff is now representing herself. See Letter from Plaintiff dated May 29, 1991 (Paper No. 87).

This Court granted Defendants' Motion to Dismiss as to Counts IV, VIII, IX, X and XI by Memorandum and Order dated October 15, 1990. See Paper No. 48. Defendants have filed the instant motion seeking summary judgment on Counts III, V, VI and VII. n5 Defendants also seek to have certain individual Defendants dismissed from this action. For the purposes of this motion, the Court will view the evidence and all justifiable inferences in the light most favorable to Plaintiff. *United States v. Diebold, Inc., 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962)* (per curiam).

n5 Signet admits that material facts remain in dispute as to Ferragamo's Title VII claims. See Signet's Motion at 4 n.6.

[*6]

II. LEGAL STANDARD

Summary Judgment is proper if the evidence before the court, consisting of the pleadings, depositions, answers to interrogatories, and admissions of record, establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. Rule 56 mandates the entry of summary judgment against a party who, after reasonable time for discovery and upon motion, "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id. at 322*. "[A] complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial [and] the moving party is 'entitled to judgment as a matter of law.'" *Id. at 323* (citations omitted).

If the evidence favoring the non-moving party is "merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby Inc., 477 U.S. 242, 249-50, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*

[*7] (citations omitted). Unsupported speculation is insufficient to defeat a motion for summary judgment. *Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987)* (citing *Ash v. United Parcel Serv., Inc., 800 F.2d 409, 411-12 (4th Cir. 1986)).* Moreover, the mere existence of some factual dispute is insufficient to defeat a motion for summary judgment; there must be a genuine issue of material fact. *Anderson, 477 U.S. at 247-48.* Thus, only disputes over those facts that might affect the outcome of the case under the governing law are considered to be "material." Id.

With these principles in mind, the Court will address the arguments presented by the parties.

III. ANALYSIS

1. Wrongful Discharge under Title VII (Count III)

In Count III of her complaint, Ferragamo alleges that:

> Defendants . . . terminated Plaintiff in retaliation for the sex discrimination charges she filed . . ., because she had become pregnant, and because they knew she was about to institute suit in this Court. . . . [This] retaliatory act . . . constituted an unlawful and wrongful discharge

[*8] in violation of *42 U.S.C. 2000e-3.*

Complaint at 11-12. Defendants argue that Count III is either a common law claim preempted by Title VII, or, to the extent Count III states a claim under Title VII, is duplicative of Plaintiff's other Title VII claims for discrimination (Count I) and retaliation (Count II).

A discrimination claim under Title VII may be based on discriminatory discharge. See *Reeb v. Marshall, 626 F.2d 43 (8th Cir. 1980); Green v. Armstrong Rubber Co., 612 F.2d 967* (5th Cir.), cert. denied, *449 U.S. 879, 66 L. Ed. 2d 102, 101 S. Ct. 227 (1980).* Such a claim must follow the traditional order and allocation of proof principles embodied in Title VII. See *Reeb, 626 F.2d at 45.*

The Court of Appeals of Maryland has recently recognized "'a cause of action for abusive [or wrongful] discharge by an employer of an at will employee when the motivation for the discharge contravenes some clear mandate of public policy.'" See *Parlato v. Abbott Lab., 850 F.2d 203, 205 (4th Cir. 1988)* (quoting *Adler v. American Standard Corp., 291 Md. 31, 47, 432 A.2d 464 (1981)).*

[*9] There are limitations, however, as to what can constitute a "clear mandate of public policy." As this Court noted in its prior Memorandum opinion, a tort claim for wrongful discharge cannot be based on "federal or state anti-discriminatory legislation since such statutes create specific procedures and remedies to redress employment civil rights violations." See Memorandum dated October 15, 1990. A tort claim for wrongful discharge is thus preempted by Title VII when the violation of public policy alleged is one embodied in Title VII.

Defendants argue that Count III states a common law wrongful discharge claim based on federal anti-discriminatory legislation, i.e., Title VII, and that Count III is thus preempted by Title VII. The Court determines, however, that Count III is more properly read as a claim for discriminatory discharge under Title VII. n6 This reading is bolstered by the language of the complaint. Count III is captioned as "Wrongful Discharge Under Title VII," and Plaintiff refers in the complaint to "claims under Title VII [as] alleged in the First, Second and Third [counts]." Complaint at 11, 13 (emphasis added). Moreover, all of Plaintiff's common

[*10] law claims contain standard language concerning pendent jurisdiction, language that is absent from Count III. Complaint at 13, 15, 17, 19, 20, 24, 26, 28. Accordingly, as Count III states a claim under Title VII, it is not preempted by Title VII.

n6 The Court has determined that Plaintiff's claim can proceed under Title VII even though Plaintiff has not so argued. The Court's actions are grounded in the well-settled principle of law that "a complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." *Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 2849, 92 L. Ed. 2d 140* (Blackmun, J., dissenting). Although the instant motion is one for summary judgment, it is analogous to a motion to dismiss, as it is not based on discovery or supporting affidavits. The Court notes that the duty articulated in Bowers would seem to be even greater when a plaintiff is proceeding pro se.

[*11]

As a claim under Title VII, Count III is, in part, duplicative of Counts I and II. Count III alleges that Defendants terminated Plaintiff for three reasons: (1) in retaliation for the EEOC charges; (2) because she became pregnant; and (3) in retaliation for this lawsuit. The first and third claims are duplicative of Plaintiff's retaliation claim (Count II), and summary judgment is granted as to those claims. The second claim, however, that Plaintiff was terminated because of pregnancy, is not duplicative of Counts I or II. Accordingly, Plaintiff will be allowed to proceed on her Title VII claim for discrimination based on wrongful discharge because of pregnancy. n7

n7 Defendants do not seem to object to Count III proceeding under Title VII. Defendants only "seek the dismissal of all the jury trial claims remaining in this case. Motion at 1. The Court notes that the retroactivity of the jury trial provision of the 1991 Civil Rights Act is the subject of another motion before this Court.

2. Breach of Contract

[*12] (Count V)

Plaintiff argues that Defendants breached three employment contracts, implied from: (1) Defendants' equal employment opportunity policy as stated in employee handbooks, employment applications and Signet advertising; (2) Defendants' probation letter; and (3) Defendants' displacement policy. n8 Defendants contend that none of these can form the basis for an implied employment contract.

n8 Defendants argue that Plaintiff cannot raise the latter two allegations because of the statute of limitations. See Reply at 11-12. The Court need not address this argument in light of the Court's determination on the merits of Plaintiff's claim.

Under Maryland law, an employment contract of infinite duration, i.e., an at will contract, may be terminated by either party at any time. See *Adler v. American Standard Corp., 291 Md. 31, 35, 432 A.2d 464 (1981); Page v. Carolina Coach Co., 667 F.2d 1156, 1158 (4th Cir. 1982)*. One exception

[*13] to this common law doctrine was recognized by the Maryland Court of Appeals in *Dahl v. Brunswick Corp., 277 Md. 471, 356 A.2d 221 (1976)*. The Dahl Court stated:

> There is abundant support for the proposition that employer policy directives regarding aspects of the employment relationship become contractual obligations when, with knowledge of their existence, employees start or continue to work for the employer.

Dahl, 277 Md. at 476. This exception was expanded upon by the Court of Special Appeals in *Staggs v. Blue Cross, 61 Md. App. 381, 486 A.2d 798 (1985)*:

> We hold that provisions in such policy statements that limit the employer's discretion to terminate an indefinite employment or that set forth a required procedure for termination of such employment may, if properly expressed and communicated to the employee, become contractual undertakings by the employer that are enforceable by the employee. In so holding, we caution that not every statement made in a personnel handbook or other publication will rise to the level of an

> [*14] enforceable contract . . . . 'General statements of policy are no more than that and do not meet the contractual requirements for offer.'

Staggs, 61 Md. App. at 392 (quoting *Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983))* (emphasis added).

This Court finds that summary judgment should be granted on Plaintiff's three claims for breach of implied employment contract. As to Plaintiff's first claim, that Defendant breached its equal opportunity policy, the Court determines that the provisions cited are merely "general statements of policy," and not definite enough to create a contractual right. n9 See *Conkwright v. Westinghouse Elec. Corp., 739 F. Supp. 1006, 1021 (D. Md. 1990)* (company pledges relating to fair treatment and equal employment are merely general statements of policy). To allow Plaintiff's claim to go forward on such general statements of policy would provide a disincentive for employers to publicize equal employment goals. See *Lofton v. Wyeth Lab., Inc., 643 F. Supp. 170, 174 (E.D. Pa. 1986).*

n9 For example, the Equal Employment Opportunity Policy Statement, appearing in the Employee Benefits Manual, states:

> It is the policy of the Union Trust Company to implement affirmatively, employment opportunities to all qualified employees and applicants without regard to race, creed, color, sex, national origin, mental or physical handicap and positive action is taken to ensure the fulfillment of this policy . . . . The objective . . . is to obtain individuals qualified and/or trained for the position by virtue of job related standards of education, training, experience and personal qualifications. . . .

See Opp., Ex. 4. Such language, beyond expressing merely a general statement of policy, is clearly aspirational, not contractual, in nature.

[*15]

Defendants' probation letter also cannot provide the basis for an implied employment contract. In the letter, Defendants list all of Ferragamo's conduct that formed the basis of the probation. Opp. at Ex. 62. The letter then states:

> To retain your employment, your verbal and nonverbal demeanor must consistently reflect an attitude that is positive and supportive of building strong relationships with your supervising officer and your counterparts. Disagreements are always acceptable; however you must disagree within the context of team spirit rather than as an adversary or as one who totally disrupts the group.

Id. The Court does not read this language as a "limit [on Signet's] discretion to terminate [Ferragamo's] indefinite employment." See *Staggs, 61 Md. App. at 392*. For example, the Court does not read this language to say: "[you will] retain your employment [if] your verbal and non verbal demeanor . . . consistently reflect[s] an attitude that is positive and supportive. . . ." As Defendants note, reading the letter in this fashion would "lead to the absurd result of persons who are on probation having a right

[*16] to continued employment that did not inure to those whose performance was satisfactory." Reply at 13. The letter is more properly read as setting goals for Plaintiff to maintain employment, not as limiting Defendants' ability to terminate employment. Accordingly, the probation letter is insufficient to create an implied contractual relationship.

Finally, Defendants' corporate displacement policy did not create a contractual relationship. Under Maryland law, an employee must know of the contractual obligation during the period of employment in order to create an implied contractual relationship. *Dahl, 277 Md. at 476* ("employer policy directives . . . become contractual obligations when, with knowledge of their existence, employees start or continue to work for the employer"); *Staggs, 61 Md. App. at 392.* Ferragamo did not become aware of Defendants' displacement policy until the time of her termination. n10 See Reply, Attach. 1, Ferragamo Dep. at 874-76. Accordingly, the displacement policy cannot provide the basis for an implied contractual relationship, and Defendants' Motion for Summary

[*17] Judgment as to Count V is granted.

n10 This corporate policy, known as the Signet Displacement Program, did not even go into effect until September 12, 1988, while Ferragamo was on maternity leave. See Opp. at Ex. 68. Ferragamo was informed of the displacement policy on the date she returned from maternity leave, when she was terminated. See Reply, Attach. 1, Ferragamo Dep. at 874-76.

3. Defamation (Count VI)

Plaintiff alleges three defamatory statements: (1) Defendant Vaughn's statement to assembled managers at the Vaughn meeting that "because of [Ferragamo's] poor work performance, [Ferragamo is] being displaced; and [Ferragamo] would have been terminated August 1st, but [she] was out on maternity leave and they didn't want to do it then," see Motion, Ex. 1, Ferragamo Dep. at 440; (2) Defendant Taylor's statement in front of a co-worker calling Ferragamo a "hussy'; and (3) Defendant Dieter's statement to Don Kenney, a prospective employer, that Ferragamo left Signet because "it didn't work

[*18] out." See Opp. at 49–59.

Defendants argue that Vaughn's statement is not actionable for three reasons: (1) the statement was not defamatory; (2) the statement was subject to a qualified privilege; and (3) Ferragamo cannot show damages. Defendants assert that the other defamatory statements, raised for the first time in Ferragamo's Opposition filed November 26, 1991, are barred by the statute of limitations. n11

n11 Again, the Court will not consider the statute of limitations argument in light of the Court's ruling on the merits.

To establish a prima facie case of defamation in Maryland, Ferragamo must show: (1) that Defendants made a defamatory communication—i.e., that Defendants communicated a statement tending to expose plaintiff to public scorn, hatred, contempt or ridicule to a third person who reasonably recognized the statement as being defamatory; (2) that the statement was false; (3) that Defendants were at fault in communicating the statement; and (4) injury. See *Kairys v. Douglas Stereo Inc., 83 Md. App. 667, 678–79, 577 A.2d 386 (1990).*

[*19]

The Court determines that the Vaughn statement cannot form the basis for a suit in defamation. The Maryland Court of Appeals has recognized a qualified privilege to make defamatory statements when "the occasion shows that the communicating party and the recipient have a mutual interest in the subject matter, or some duty with respect thereto." *Hanrahan v. Kelly, 269 Md. 21, 28, 305 A.2d 151 (1973).* This privilege has been held to attach to communications arising out an employer-employee relationship. See *Happy 40, Inc. v. Miller, 63 Md. App. 24, 31, 491 A.2d 1210 (1985); Macy v. Trans World Airlines, Inc., 381 F. Supp. 142, 146 (D. Md. 1974).* The Maryland Court of Special Appeals has justified the qualified privilege in the employment context as follows:

> The conditional privilege that all parties agreed existed in this case was clearly for the purpose of permitting Booher to explain to his remaining employees the reason for the appellee's discharge. If he were not permitted to tell them his reasons, he would run the risk of appearing arbitrary and

> [*20] capricious. This would affect the remaining employee's morale and sense of security and such a situation would not be in the best interests of the appellants.

Happy, 63 Md. App. at 35-36. Thus the conversation between Vaughn and other management-level employees about the reasons for Ferragamo's termination enjoyed a conditional privilege.

A conditional privilege may be lost, however, upon a showing of actual malice, "a very difficult standard for any plaintiff to meet." *Fitzgerald v. Penthouse Int'l, Ltd., 691 F.2d 666, 670* (4th Cir.), cert. denied, *460 U.S. 1024, 75 L. Ed. 2d 497, 103 S. Ct. 1277 (1982).* A determination of actual malice is essentially an inquiry into whether the privilege has been abused. *Hollander v. Pan American World Airways, Inc., 382 F. Supp. 96, 104 (D. Md. 1973).* Thus, actual malice in the defamation context means not hatred or spite but rather "knowledge of falsity or reckless disregard for truth." *Marchesi v. Franchino, 283 Md. 131, 139, 387 A.2d 1129 (1977).*

The Court determines, as a matter of law, that Ferragamo cannot prove

[*21] actual malice. First, there is no evidence of excessive publication or unnecessarily abusive language. See *General Motors, Corp. v. Piskor, 277 Md. 165, 173, 352 A.2d 810 (1976)* (abuse of privilege to make statement in glass-enclosed office in full view of 5,000 employees). Vaughn did not use excessive language in informing the other managers of Ferragamo's termination. To the contrary, the alleged defamatory statement was brief and fairly moderate. Moreover, the statement was made in a proper manner, i.e., in private, and only to proper parties. Although the statement was unsolicited, that is not sufficient to constitute abuse of the privilege when statement was made honestly, fairly and in good faith. *Hollander, 382 F. Supp. at 105.* There is no evidence that the statement was made in furtherance of an unprotected interest. See *Happy, 63 Md. App. at 35-36*

Second, and critically, there is no evidence in the record that Vaughn acted with "knowledge of falsity or reckless disregard for truth." *Marchesi, 283 Md. at 139.*

[*22] Ferragamo seems to allege that the privilege was abused because Vaughn could not reasonably have believed the truth of his statement. In support, Ferragamo asserts that Vaughn "recklessly disregarded" the truth by calling Ferragamo a poor performer when he had failed to complete her most recent performance appraisal. Cf. *Piskor, 277 Md. at 173* (reckless to accuse person of stealing without first making required routine inventory check). Vaughn's failure to complete a performance appraisal, however, cannot reasonably rise to a reckless disregard of truth. Vaughn had ample ground to assert that Ferragamo had been terminated for poor performance. Ferragamo had been placed on ninety days probation for insubordination, and she had participated in several discussions with supervisors about her allegedly deficient performance. Moreover, Mr. Vaughn, the employee who would have completed Ferragamo's performance appraisal, had participated in the decision to place Ferragamo on probation, see Reply at 6, and was obviously aware of the quality of Ferragamo's work. Accordingly, the Court finds that the conditional privilege has not been abused,

[*23] and that Vaughn's statement cannot support a claim for defamation.

The Court also determines that Ferragamo cannot proceed on her claim that Defendant Taylor defamed her by calling her a "hussy" in front of a co-worker. Ferragamo has not presented any evidence that she suffered damages as a result of this allegedly defamatory statement. Finally, Ferragamo cannot proceed on her claim that Defendant Dieter defamed her by making certain statements to Don Kenney, a prospective employer after Ferragamo left Signet. The only statements that Dieter made to Kenney about Ferragamo were: (1) that Ferragamo left Signet because "it didn't work out;" and (2) that "when she left . . . she . . . kind of hated me." See Opp., Ex. 12, Dieter Dep. at 277-78. The Court determines that no reasonable jury could conclude that these statements "expose[d] plaintiff to public scorn, hatred, contempt or ridicule." See *Kairys, 83 Md. App. at 678-79.* Accordingly, Defendants' Motion for Summary Judgment on Count VI is granted.

4. Invasion of Privacy (Count VII)

Ferragamo alleges that Vaughn's statement — i.e., that Ferragamo was terminated

[*24] for poor work performance — invaded her privacy by placing her in a false light. Defendants argue that summary judgment should be granted because: (1) Vaughn's comments were conditionally privileged; and (2) the comments were not sufficiently publicized.

The Maryland Court of Appeals has recognized and adopted the principle that there is a conditional privilege for a communication made to a person who is acting in the public interest. See *Orrison v. Vance, 262 Md. 285, 277 A.2d 573 (1971)*. Upon a review of Maryland cases, it seems to this Court that the privilege has only arisen in the context of defamation cases. It also seems to this Court that the privilege is equally applicable to invasion of privacy torts predicated upon publication, including the tort of false light. n12 This analysis is supported by the *Restatement (Second) of Torts § 652G* (1977). Comment (a) to this section states: "under any circumstances that would give rise to a conditional privilege for the publication of defamation, there is likewise a conditional privilege for the invasion of privacy." See also *Machleder v. Diaz, 801 F.2d 46, 53 (2nd Cir. 1986),*

[*25] cert. denied, *479 U.S. 1088, 94 L. Ed. 2d 150, 107 S. Ct. 1294 (1987)* (right to privacy does not prohibit communications that would be privileged under the law of slander and libel); *Parnell v. Booth Newspapers, Inc., 572 F. Supp. 909, 922 (W.D. Mich. 1983)* (citing § 652G).

n12 Concerning false light, the Restatement (Second) of Torts provides:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (Second) of Torts § 652E (1977).

This Court has already found, in the context of Ferragamo's defamation claim, that Vaughn's comments were conditionally privileged. These comments are also

[*26] conditionally privileged for the purposes of false light. Accordingly, because the privilege was not abused, Defendants' Motion for Summary Judgment is granted as to Count VII.

5. Motions to Dismiss

Defendants argue that certain Defendants — Peck, Cowie, Deane, Freedman and Hines — should be dismissed from this action because they were not named in Plaintiff's EEOC charge. Plaintiff argues that strict naming requirements should not be followed because: (1) Plaintiff is proceeding pro se; and (2) these Defendants had notice of the alleged violations.

Under Title VII, a civil action may be brought only "against the respondent named in the [administrative] charge." *42 U.S.C. § 2000e-5*(f)(1). This naming requirement serves two purposes:

> First, it notifies the charged party of the asserted violation. Secondly, it brings the charged party before the EEOC and permits effectuation of the Act's primary goal, the securing of voluntary compliance with the law.

Alvarado v. Board of Trustees, 848 F.2d 457, 458-59 (4th Cir. 1988) (quoting *Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969)).*

[*27]

Although the Fourth Circuit has recognized that "Title VII does not require procedural exactness from lay complainants," see *Alvarado v. Board of Trustees, 848 F.2d 457 at 460,* it appears that Plaintiff was represented by counsel at the EEOC stage of this dispute. n13 Alvarado recognized an exception to hypertechnical naming requirements when an unnamed defendant is functionally identical to the named defendant. *Alvarado, 848 F.2d at 460* (lay plaintiff did not need to name board of trustees in EEOC charge because board of trustees is "identical with" college and college was named). When there is such a functional identity, the spirit of the naming requirement is met. This Court will not comment on whether the Alvarado exception applies only to lay complainants, as it is sufficient to note that the exception is not applicable to Defendants Peck, Cowie, Deane, Freedman and Hines. n14 Accordingly, Defendants motion to dismiss is granted.

n13 Ferragamo was represented by her attorney — Mr. Sapero — at in-house discussions with her supervisors on January 14, 1987. See Opp. at 12. Ferragamo filed her EEOC charges in March, 1987. Id. at 15. Sapero ceased representation on May 29, 1991. It seems a fair assumption that Sapero assisted Ferragamo with her EEOC complaint. Moreover, Defendants assert as much in their Motion to Dismiss, see Motion at 33, and Ferragamo does not dispute that assertion in her Opposition.

[*28]

n14 Peck was President of Signet Banking Corporation from January 1, 1986 until his retirement on April 30, 1988. Cowie was President of Signet Bank/Maryland from 1986 until his retirement on April 18, 1991. Deane was Chairman of the Board of Directors of Signet Banking Corporation from 1973 until his retirement on March 1, 1990. Hines was Executive Vice President in charge of general administration from 1980 until his retirement on January 1, 1987. Freeman was Vice Chairman from January 1, 1986 until May 1, 1988, when he became President and CEO. See Motion at 31 n.19.

IV. CONCLUSION

For the above stated reasons this Court determines that Defendants' Motion for Summary Judgment should be granted as to Counts in, VI and VII, and denied as to Count III. This Court also determines that Defendants' Motion to Dismiss Defendants Peck, Cowie, Deane, Freedman and Hines should be granted.

A separate order will be issued.

William M. Nickerson, United States District Judge

Dated: March 17, 1992.

ORDER - March 17, 1992, Filed; March 19, 1992, Entered

In accordance with the

[*29] foregoing Memorandum and for the reasons stated therein, IT IS this 17th day of March, 1992, by the United States District Court for the District of Maryland, ORDERED:

1. That Defendants' Motion for Partial Summary Judgment (Paper No. 88) is GRANTED in part and DENIED in part;

a. That Defendants' Motion is DENIED as to Count III;

b. That Defendants' Motion is GRANTED as to Counts V, VI and VII.

2. That Defendants' Motion to Dismiss Defendants Peck, Cowie, Deane, Freedman and Hines is GRANTED;

3. That the Clerk of the Court shall mail copies of this Order to the moving party and all counsel of record.

William M. Nickerson

LEXSEE 2005 US APP LEXIS 289

THOMAS B. FORD, JR., Plaintiff - Appellant, versus GENERAL ELECTRIC LIGHTING, LLC, Defendant - Appellee.

No. 04-1211

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

121 Fed. Appx. 1; 2005 U.S. App. LEXIS 289

October 28, 2004, Argued
January 7, 2005, Decided

NOTICE: [**1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Western District of Virginia, at Harrisonburg. Samuel G. Wilson, Chief District Judge. CA-03-24. *Ford v. GE Lighting, LLC, 2004 U.S. Dist. LEXIS 10570 (W.D. Va., Feb. 6, 2004)*

DISPOSITION: Affirmed.

LexisNexis(R) Headnotes

COUNSEL: ARGUED: Brad D. Weiss, CHARAPP & WEISS, L.L.P., McLean, Virginia; James Anthony Klenkar, HALL, MONAHAN, ENGLE, MAHAN & MITCHELL, Winchester, Virginia, for Appellant.

Marc Antoney Antonetti, BAKER & HOSTETLER, L.L.P., Washington, D.C., for Appellee.

ON BRIEF: Jennifer L. Rasile, CHARAPP & WEISS, L.L.P., McLean, Virginia, for Appellant.

Elizabeth A. Scully, BAKER & HOSTETLER, L.L.P., Washington, D.C., for Appellee.

JUDGES: Before NIEMEYER, KING, and SHEDD, Circuit Judges.

OPINION: [*2] PER CURIAM:

Thomas Ford appeals the district court's award of summary judgment to his former employer, General Electric Lighting ("GE Lighting"), in a civil action alleging racial discrimination and retaliation against Ford, in violation of *42 U.S.C. § 1981*. Ford's lawsuit stems from adverse employment actions taken against him by GE Lighting [**2] following a workplace altercation between Ford, an African-American, and a white co-worker. As explained below, Ford has failed to establish either his racial discrimination claim or his retaliation claim. Because we also reject Ford's contention that the court's handling of discovery proceedings entitles him to relief, we affirm the district court.

I.

A.

Prior to his workplace fight with William Heller, which occurred on May 16, 2002, Ford had been employed by GE Lighting at its Winchester, Virginia, Lamp Plant (the "Plant") for more than twenty-six years. n1 During the lunch period the day before the altercation, Ford, accompanied by co-worker Steve Johnson, entered the employees' break room of the Plant, where Heller and other white employees were eating food provided by a visiting vendor. n2 Ford and Johnson each then made statements that only certain employees of the Plant (including Heller) received free food. This discussion lasted five to ten minutes, and Johnson and Ford then departed.

n1 We relate the details of this event and the subsequent actions of GE Lighting in the light most favorable to Ford. See *Spriggs v. Diamond Auto Glass, 242 F.3d 179, 182 (4th Cir. 2001)* ("Spriggs II").

[**3]

n2 The vendor was apparently present at the Plant to conduct various mechanical repairs and had purchased lunch for some of the Plant's employees.

At approximately seven o'clock the following morning, as Ford walked to his workstation at the Plant, Heller angrily called to Ford, shouting Ford's name over machinery noise that required workers to wear ear plugs. When Ford did not respond, Heller crossed an aisle and confronted Ford about the statements he had made in the break room the previous day. After Heller cursed Ford and shook his finger in Ford's face, Ford turned and walked away. Heller pursued, continued to curse and point, and punched Ford in the face and body. Ford then sought to restrain Heller and punched him, causing Heller to bleed. Co-workers Johnson and Gene Orndorff then separated Ford and Heller.

Within minutes, Ford sought out the shift supervisor, Ron Kirby, and recounted the details of the fight. Ford returned to work, and later that day he spoke with

[*3] Plant Manager Richard Calvaruso. Ford complained to Calvaruso that Heller had attacked him and that the attack was racially [**4] motivated.

On May 24, 2002, six days after the altercation, Calvaruso terminated Ford and Heller for violating GE Lighting's policy against workplace violence. In his termination letter, Calvaruso observed that the Plant "paid very close attention to [Ford's] allegation that [Heller's] action was racially motivated" but had been unable to find support for it. Prior to the terminations, GE Lighting interviewed and obtained statements from seven witnesses to the break room discussion and the fight. The witnesses provided widely differing accounts of the two events, and disputed whether Heller or Ford threw the first punch.

On May 28, 2002, Ford appealed his termination to the Plant's Peer Review Panel, as had Heller. n3 After a hearing conducted on June 11, 2002, the Panel recommended that Ford and Heller be reinstated, subject to certain disciplinary measures. These measures included modification of their Plant seniority dates to July 22, 2002, a prohibition against posting for new positions in the Plant for a period of twenty-four months, the imposition of periods of unpaid suspension, and letters of reprimand being placed in their personnel files. Although GE Lighting's policy [**5] required the discharge of Plant employees who received two letters of reprimand (Ford had received a reprimand thirteen years earlier), the Panel recommended excepting Ford from that rule. On June 12, 2002, Calvaruso adopted all the Panel's recommendations on Ford and Heller save one - he reduced the ineligibility period for posting for new Plant positions to twelve months.

n3 The Peer Review Panel, consisting of three peers at the Plant and two management representatives, convenes to hear employee appeals. The Panel makes its decisions by majority vote and the ballots are secret.

On November 1, 2003, GE Lighting laid off approximately thirty employees on the basis of Plant seniority as part of a reduction in force (the "RIF"). Because they had lost their Plant seniority as a result of the fight, Ford and Heller were laid off as part of the RIF. On January 9, 2004, both Ford and Heller were recalled to the Plant.

B.

According to Ford, GE Lighting discriminated against its African-American employees throughout [**6] his employment. He asserts, inter alia, that employees of the Plant regularly referred to African-American employees with racially offensive epithets and that African-American employees were not promoted fairly. He also maintains that, in 1999, the Plant's former Human Resources Manager permitted Caucasian employees to have Sundays off for religious purposes but denied Ford the same accommodation. Ford complained to GE Lighting supervisors and managers, including Calvaruso, on approximately ten occasions about racial comments and jokes in the Plant and about the Plant's failure to fairly promote its African-American employees. For example, in 2001, Ford accused Calvaruso of being a racist and avoiding him. Calvaruso testified that he immediately apologized and requested that Ford give him a chance to prove this was not the case.

C.

On April 16, 2003, Ford filed this civil action against GE Lighting in the Western District of Virginia. His complaint alleged

[*4] that GE Lighting had discriminated against him on account of his race and retaliated against him in response to his complaints of racial discrimination, in contravention of *42 U.S.C. § 1981*. n4 [**7] The discriminatory and retaliatory acts included his termination, the removal of his Plant seniority, the prohibition against posting for new positions within the Plant for twelve months, an unpaid suspension, and a letter of reprimand.

> n4 *Section 1981 of Title 42* grants all persons within the jurisdiction of the United States "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." *42 U.S.C. § 1981(a)*. See *Spriggs v. Diamond Auto Glass, 165 F.3d 1015, 1018-19 (4th Cir. 1999)* ("Spriggs I").

In conducting discovery, Ford sought to secure documents relating to the investigation of his altercation with Heller from both GE Lighting and its parent, General Electric Company ("GE"). GE Lighting opposed Ford's discovery efforts concerning the fight investigation, contending that the documents contained attorney-client and attorney work product privileged information. On December 2, 2003, a magistrate judge ordered GE Lighting to produce [**8] the requested documents to Ford but authorized the redaction of those portions that were "within the privilege and protection of" the attorney work product privilege (the "December Order"). In addition, in early November 2003, Ford secured the issuance of a subpoena duces tecum to GE, requesting similar documents held by GE. In response, GE contended that the documents were privileged. Shortly thereafter, on December 15 and 19, 2003, Ford filed motions to compel GE Lighting and GE to produce documents on their Ford-Heller fight investigations, relying on the December Order and the subpoena issued to GE.

On December 29, 2003, after extensive discovery (including at least seventeen depositions, three requests by Ford for documents, and various interrogatories), GE Lighting filed a motion for summary judgment on Ford's claims. A hearing on the summary judgment request was then scheduled for January 16, 2004. A day earlier, on January 15, 2004, the magistrate judge heard argument on Ford's motions to compel, and he ordered GE Lighting and GE to produce the requested documents to the district court for in camera review (the "January 15 Order"). In compliance with that directive, GE Lighting [**9] and GE submitted the documents to the district court the following morning. Later that day, January 16, the district court heard argument on GE Lighting's motion for summary judgment. During that proceeding, Ford did not raise any issue concerning the January 15 Order or the documents produced for in camera review. On January 24, 2004, the court orally notified counsel that it intended to grant GE Lighting's summary judgment motion, and it removed the matter from its trial calendar. n5 On February 5, 2004, Ford filed objections to the magistrate judge's January 15 Order, asserting that GE was not entitled to assert the work product privilege.

> n5 In its July 8, 2003, Scheduling Order, the district court calendared a jury trial to begin on January 27, 2004.

On February 6, 2004, the district court filed its opinion granting summary judgment to GE Lighting on both of Ford's claims. *Ford v. GE Lighting, LLC, 2004 U.S. Dist. LEXIS 10570, No. 5:03CV00024 (W.D. Va. Feb. 6, 2004)*. The court entered a separate order that day denying [**10] all outstanding discovery motions as moot. Ford has appealed, maintaining that the court erred

[*5] in its summary judgment assessment of his claims, and that its ruling, in view of the January 15 Order, was rendered prematurely. We possess jurisdiction pursuant to *28 U.S.C. § 1291*.

II.

We review de novo a district court's award of summary judgment, viewing the facts in the light most favorable to, and drawing all inferences in favor of, the appellant. *Love-Lane v. Martin, 355 F.3d 766, 778 (4th Cir. 2004)*. An award of summary judgment is only appropriate where the pleadings, affidavits, and responses to discovery "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*; see *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. We review a district court's rulings on discovery matters for abuse of discretion. *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390, 396 (4th Cir. 2003)*.

III.

Ford's claims are asserted pursuant [**11] to *§ 1981 of Title 42,* which accords "[a]ll persons within the jurisdiction of the United States . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." *42 U.S.C. § 1981(a)*. Ford alleges that GE Lighting contravened *§ 1981* in two respects: racial discrimination and retaliation. n6 Because Ford has presented no direct evidence of racial discrimination, his claims are subject to the judicially created burden-shifting scheme set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)*, and its progeny. *Hawkins v. Pepsico, Inc., 203 F.3d 274, 278 (4th Cir. 2000)*. Under this proof scheme, if Ford could successfully establish a prima facie case of racial discrimination or retaliation, "the production burden shifts to [GE Lighting] to articulate some legitimate, nondiscriminatory reason" for its actions. Id. (citations omitted). In turn, if GE Lighting could successfully meet its burden, Ford must then show that GE Lighting's proffered reason for its decisions was pretextual and that race or retaliation was the actual reason for its adverse [**12] employment actions. Id.

n6 GE Lighting does not contest the fact that Ford's employment at the Plant constituted a contract for purposes of *§ 1981*. See *Spriggs I, 165 F.3d at 1018-19* (recognizing that "an atwill employment relationship [under Maryland law] is contractual" and that "such relationships may therefore serve as a predicate for *§ 1981* claims"); see also *Miller v. SEVAMP, Inc., 234 Va. 462, 362 S.E. 2d 915, 916-17, 4 Va. Law Rep. 1309 (Va. 1987)* (recognizing that at-will employment relationships are contractual under Virginia law).

A.

In order for Ford to properly forecast a racial discrimination claim under *§ 1981*, he must show, viewed in the light most favorable to him, that (1) he is a member of a protected class, (2) an adverse employment action was taken against him, (3) other Plant employees of a different race had engaged in conduct of comparable seriousness, and (4) the disciplinary measures imposed on those other employees were less severe than those imposed on [**13] him. See *Moore v. City of Charlotte, 754 F.2d 1100, 1105-06 (4th Cir. 1985)* (recognizing ways of establishing prima facie claim of racial discrimination in Title VII context); see also *Gairola v. Va. Dep't of Gen. Servs., 753 F.2d 1281, 1285 (4th Cir. 1985)* (holding that elements of prima facie Title VII claim and prima facie *§ 1981* claim are identical). It is undisputed that Ford satisfies

[*6] the first two prongs of his racial discrimination claim.

Assessing the latter two prongs of his claim in the proper light, Ford proffered sufficient evidence to show that the prohibited conduct in which he engaged - a physical workplace altercation with another Plant employee - was comparable in seriousness to several instances of misconduct by non-African-American employees. See *Cook v. CSX Transp., Corp., 988 F.2d 507, 511 (4th Cir. 1993)* ("[T]he comparison will never involve precisely the same set of work-related offenses occurring over the same period of time and under the same set of circumstances."). In support of his claim, Ford relies on several incidents in which white employees at the Plant violated GE Lighting's policy against [**14] workplace violence and were neither terminated nor received discipline as severe as that imposed on Ford. First, in April 1997, Tom DeMayo intentionally pushed Guy Sager (both white employees), causing Sager to fall into a pipe, cutting and bruising his head. Approximately ten years ago, Ellen Miller, a white employee, slapped a temporary employee. Finally, approximately twenty years ago, William Webster and Charlie Colliflower, both white employees, shoved each other after a lunch table disagreement; Colliflower then put Webster in a "bear hug." n7 Ford has not provided an example of any altercation where a white employee involved in a workplace fight alleged self-defense.

> n7 While Ford also points to several other incidents, they are not of comparable seriousness, either because there was no physical contact between the employees or because the parties agreed that the rough-housing was a "joke" or "horseplay."

Even more than the analogous workplace incidents to which our attention has been directed, Ford [**15] and Heller were, in this situation, identically situated because they were involved in the same workplace incident. Importantly, GE Lighting saw fit to discipline Heller, the white employee, in the same manner as it disciplined Ford. Ford's attempt to differentiate himself from Heller on the ground that he acted in self-defense while Heller was the aggressor in the altercation is unavailing. And the fact that Ford may have acted in self-defense is immaterial, because it is undisputed that both Ford and Heller violated the Plant's policy against violence. Ford has proffered no evidence that GE Lighting has heretofore disciplined a white employee claiming self-defense in a manner less severely than it disciplined him. In such circumstances, we must agree with the district court that Ford has failed to make a prima facie showing of racial discrimination. As a result, the court properly awarded summary judgment to GE Lighting on Ford's discrimination claim.

B.

1.

As explained below, the district court's award of summary judgment to GE Lighting on Ford's retaliation claim must also be sustained. In order to make a prima facie claim of retaliation, Ford was obliged to show that [**16] (1) he engaged in protected activity, (2) he suffered an adverse employment action at the hands of GE Lighting, and (3) GE Lighting took the adverse action against him because of his protected activity. *Spriggs II, 242 F.3d at 190.*

Ford readily satisfies the first two prongs of his retaliation claim. First, it is undisputed that Ford was engaged in a protected activity when he filed his internal racial discrimination complaints; namely, he alleged that Heller's attack was racially motivated, that GE Lighting had failed to promote African-Americans, and that certain Plant employees routinely

[*7] made racial jokes and slurs. See *Peters v. Jenney, 327 F.3d 307, 320 (4th Cir. 2003)*. Second, Ford's termination by GE Lighting, and the conditions of his reinstatement, such as his loss of seniority, constituted adverse employment actions. See *James v. Booz-Allen & Hamilton, 368 F.3d 371, 375-76 (4th Cir. 2004)*.

Under the third prong of his retaliation claim, however, Ford must show that GE Lighting's decisionmaker in the adverse action - Calvaruso - had knowledge of Ford's protected activities. See *Price v. Thompson, 380 F.3d 209, 213 (4th Cir. 2004)*. [**17] In making this assessment, we are obliged to consider the time period between the employee's protected activity and the employer's adverse employment actions, for "the passage of time tends to negate the inference of discrimination." *Price, 380 F.3d at 213*. Viewing the summary judgment record in the light most favorable to Ford, a reasonable trier of fact could find that Calvaruso knew Ford had engaged in protected activity, and the brief period of time. time between this activity and Ford's discharge - six days - permits an inference of retaliation. First of all, before Ford's termination in May 2002, Ford had complained to Calvaruso directly that Heller's conduct in the altercation was racially motivated, as Calvaruso acknowledged. Second, in 2001, during Calvaruso's first week at the Plant, Ford accused Calvaruso of being a racist and avoiding him. n8 In these circumstances, Ford has established a prima facie case of retaliation, in that a reasonable trier of fact could conclude that GE Lighting, specifically Calvaruso, knew of Ford's protected activity and soon thereafter discharged Ford. See *Karpel v. Inova Health Sys. Servs., 134 F.3d 1222, 1229 (4th Cir. 1998)* [**18] (holding that little or no direct evidence of causal connection between plaintiff's protected activity and adverse employment action is required for plaintiff to survive summary judgment).

> n8 Ford's other evidence that Calvaruso had knowledge of Ford's protected activity is inapposite. First, approximately two to three months prior to the altercation, Ford complained to Russell Gallimore, the Employee Practices Manager in Cleveland, Ohio, about GE Lighting's failure to promote African-Americans. Calvaruso claimed that he had no knowledge of this complaint; Ford offers no evidence to the contrary. Second, in 1997, Ford, along with six other employees, met with the Plant's Human Resources Manager, four years prior to Calvaruso's employment at the Plant, to discuss a racial slur at the Plant. This 1997 incident as too attenuated for a reasonable juror to infer causation.

2.

In assessing the final prong of the *McDonnell-Douglas* test, however, Ford's proof comes up short, in that GE Lighting has proffered [**19] a legitimate, nondiscriminatory reason for disciplining Ford, that is, fighting in the workplace. *Hawkins, 203 F.3d at 278*. In response to this proffer, Ford bore the burden of establishing that GE Lighting's reason for his discipline was a pretext, and that Ford's race was the actual reason for GE Lighting's discipline of him. Id.; see also *DeJarnette v. Corning, Inc., 133 F.3d 293, 299 (4th Cir. 1998)* ("[I] t is not our province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff's termination . . . .") (citations omitted).

In Reeves v. Sanderson Plumbing Products, Inc., the Supreme Court identified several factors appropriate to a consideration of pretext: the strength of the plaintiff's prima facie case, probative evidence that the employer's explanation is false, and any other evidence from which "no rational factfinder could conclude" there was racial discrimination. *530 U.S. 133, 148-49, 147 L. Ed. 2d 105, 120 S. Ct. 2097*

[*8] *(2000)*; see also *Price, 380 F.3d at 213-14* (holding plaintiff did not make adequate showing of pretext on retaliation claim). Here, Ford has [**20] not forecast a particularly strong prima facie case of retaliation, pointing to only two instances where Calvaruso may have known of Ford's protected activities. Fatal to Ford's retaliation claim, though, is his equivocal evidence that GE Lighting acted on a pretext. Ford maintains that GE Lighting's failure to properly investigate his racial discrimination complaint that the fight was racially motivated demonstrates that its proffered reason for terminating him is not credible. However, GE Lighting investigated Ford's allegation that the fight was racially motivated: Ford's termination letter recounted that GE Lighting "paid very close attention to" his allegation. Moreover, Calvaruso testified that he found no evidence that the fight was racially motivated and, importantly, none of the seven eyewitnesses suggested that racial remarks had been made, either during the fight or in the earlier break room discussion. Although Rachel Franklin, the Plant's Human Resources Director, testified that she had not personally investigated any issue of racial discrimination alleged by Ford prior to his termination, she brought the issue of discrimination to the attention of the Peer Review Panel [**21] in order that they consider it in Ford's appeal.

Finally, the fact that Ford and Heller received identical punishments is compelling support for the proposition that "no rational factfinder could conclude" that Ford's discipline was premised on retaliation. *Reeves, 530 U.S. at 148*. As a result, Ford has failed in his burden to show that the nondiscriminatory reason proffered by GE Lighting for his discipline was false. The district court therefore was justified in awarding summary judgment to GE Lighting on Ford's retaliation claim.

IV.

Lastly, we turn to Ford's contention that the district court erred in prematurely granting summary judgment to GE Lighting, prior to its review of the documents the magistrate judge had ordered produced in camera. n9 Ford is precluded, however, from contending that inadequate discovery rendered summary judgment inappropriate, in that the court was never advised that Ford deemed additional discovery necessary in order to permit him to respond to GE Lighting's summary judgment motion. See *Fed. R. Civ. P. 56(f)* (providing that party opposing summary judgment on grounds that more discovery [**22] is necessary must support that point with appropriate affidavits); see also *Shafer v. Preston Mem'l Hosp. Corp., 107 F.3d 274, 282 (4th Cir. 1997)* ("Shafer is precluded from arguing that inadequate discovery made summary judgment inappropriate because she did not submit an affidavit informing the district court that additional discovery was necessary for her to respond to the Hospital's summary judgment motion."). We have advised litigants that we "place great weight on the *Rule 56(f)* affidavit" and that "the failure to file an affidavit . . . is sufficient grounds to reject a claim that the opportunity for discovery was inadequate." *Evans v. Techs. Applications & Serv. Co., 80 F.3d 954, 961 (4th Cir. 1996)*(citations omitted).

> n9 The record does not reflect whether or not the district court conducted an in camera review of the documents produced by GE and GE Lighting on January 16, 2004, before it issued its written summary judgment opinion on February 2, 2004. Nevertheless, the court possessed the documents for eight days prior to notifying the parties, on January 24, 2004, of its decision to award summary judgment to GE Lighting.

[**23]

More importantly, Ford failed to advise the court at the summary judgment hearing that the discovery documents had been

[*9] submitted for in camera review or that it deemed additional discovery to be necessary. Cf. *Harrods Ltd. v. Sixty Internet Domain Names, 302 F.3d 214, 244-45 (4th Cir. 2002)* (concluding that nonmoving party's objections that summary judgment was premature served as functional equivalent of affidavit). In this proceeding, because Ford neither filed an affidavit supporting further discovery nor contended at the summary judgment hearing that a ruling was premature, we are unable to conclude that the district court abused its discretion in its handling of these discovery issues.

V.

Pursuant to the foregoing, we affirm the district court's award of summary judgment to GE Lighting.

AFFIRMED

LEXSEE 765 F SUPP 279

JOSEPH GARDINER, ET AL. v. JAMES D. TSCHECHTELIN, ET AL.

Civil No. HM-90-3218

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

765 F. Supp. 279; 1991 U.S. Dist. LEXIS 8375

June 11, 1991

LexisNexis(R) Headnotes

COUNSEL:

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JUDGES:

Herbert F. Murray, Senior United States District Judge.

OPINIONBY:

MURRAY

OPINION:

[*280] MEMORANDUM

HERBERT F. MURRAY, SENIOR UNITED STATES DISTRICT JUDGE

Plaintiffs, a class comprised of faculty members who enjoyed tenure at the Community College of Baltimore ("CCB"), have brought this action under *42 U.S.C. § 1983* challenging the abrogation of tenure which

[*281] occurred after the State of Maryland took over the college, now called the New Community College of Baltimore ("NCCB"). Plaintiffs contend that defendants n1 have violated the Contracts Clause and Due Process Clause of the United States Constitution.

n1 The defendants are: James D. Tschechtelin, individually and in his capacity as President of the New Community College of Baltimore; Ron D. Wright, individually and in his capacity as Vice President for Academic Affairs of the New Community College of Baltimore; Marion Pines, individually and in her capacity as President, Board of Trustees of the New Community College of Baltimore; and Barbara Hopkins, individually and in her capacity as Chairperson, Faculty Appeals Board of the New Community College of Baltimore.

[**2]

The parties have filed cross-motions for summary judgment. A hearing on the motions was held on Friday, May 17, 1991. The Court has considered the written memoranda and exhibits submitted by counsel and the arguments made at the hearing, and is now prepared to rule. This case was put on an expedited schedule to ensure that a ruling could be made prior to the close of the school year, June 30, 1991. The parties and the Court agree that the issues presented are questions of law that can be properly resolved on summary judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1947, the City of Baltimore under its Charter Powers established Baltimore Junior College, later to become the Community College of Baltimore. The College was organized as a division of the City's Department of Education and governed by the Board of School Commissioners. In 1961, the Maryland General Assembly authorized the creation of a system of community colleges throughout the State. 1961 Md. Laws Ch. 31. On June 22, 1961, the Baltimore City Board of School Commissioners met as the Board of Trustees for Baltimore Junior College and established the "Baltimore Community College" under Md. Ann. Code art. 77, [**3] § 300 (1959). The College adopted its own By-laws in 1962, providing that the President could elect a teacher to tenure following five years of probationary service. Through 1968, the Board of School Commissioners and the Board of Trustees for Baltimore Junior College were one and the same. In 1971, the College's Board of Trustees amended its By-laws, setting forth the manner in which faculty would be elected to "permanent tenure" and explaining the disciplinary procedures that would apply to tenured faculty.

Until June 30, 1990, the Community College of Baltimore was a Baltimore City institution overseen by the State Board of Community Colleges and the Maryland Higher Education Commission and receiving substantial State funding. However, unlike most of the other community colleges in Maryland, for which the board members were appointed by the Governor, the members of the Board of Trustees for the Community College of Baltimore were appointed by the Mayor and City Council of Baltimore. *Md. Educ. Code Ann. § 16-502* (1985) (repealed Jan. 1, 1991). During the past decade, CCB faced a drastic decline in enrollment and significant increase in tuition fees. Floor Report, Economic & Environmental [**4] Affairs Committee on House Bill 381 (Defendants' Ex. 3). Baltimore City residents were much more likely to register at a community college other than CCB. *Id.* It was felt that the College curriculum was not adequately meeting the needs of the students in Baltimore City, who face the highest unemployment rate in the State. *Id.* Moreover, Baltimore City did not have the funds to run the College so as to meet the needs of the community. *Id.* Mayor Kurt L. Schmoke of Baltimore City proposed to Governor William D. Schaefer that the State of Maryland assume financial responsibility for the College. On January 22, 1990, the Board of Trustees of CCB voted to endorse a proposal for the State to take over the College.

In 1990, the Maryland General Assembly passed Senate Bill 381 and House Bill 381, codified at *Md. Educ. Code Ann. § 16-601-610* (Supp. 1989), which decreed that the Community College of Baltimore was now a State institution called the New Community College of Baltimore. The statute authorizes the College to continue

[*282] for a trial period of only three years, and new legislation must be enacted to continue the College past June 30, 1993. Under the statute, a new Board of [**5] Trustees was established, with members appointed by the Governor with the advice and consent of the Senate. *Id.* at § 16-604(b). The statute provides that neither the State, the New Community College nor its Board of Trustees would be responsible for any liability or contract of the Community College of Baltimore, unless expressly assumed by the new Board of Trustees. *Id.* at § 16-610. A sub-section entitled "Previous employee; temporary employment" requires that the NCCB's Board of Trustees "offer employment from July 1, 1990 through December 31, 1990" to any faculty member or other employee of the Community College of Baltimore. *Id.* at § 16-609(a). The terms and conditions of employment for any officer or faculty member would be set by the new Board of Trustees. *Id.* at § 16-609(f).

On May 1, 1990, Dr. Joseph Durham, then president of CCB, sent letters to all CCB employees, giving them notice of termination effective June 30, 1990. On May 21, 1990, James D. Tschechtelin, formerly executive director of the State Board for Community Colleges, was appointed "Director of Transition" by the Board of CCB and put on the City payroll. n2 On July 1, 1990, Mr. Tschechtelin became [**6] "Interim President" of the New Community College of Baltimore. After June 30, 1990, the New Community College of Baltimore continued to operate as before, offering the same courses and degrees, employing the same faculty, and enrolling the same student body. NCCB continued to employ all faculty members who did not resign. Of the approximately 110 faculty members at CCB, 96 remained and were employed by NCCB after July 1, 1990. The faculty continued with the same teaching assignments and salaries as they enjoyed previously at CCB. In addition, approximately 12 new faculty members were hired.

n2 Mr. Otis Warren, Chairman of the CCB Board of Trustees, states that the Board of Trustees for the New Community College of Baltimore confirmed Mr. Tschechtelin as Director of Transition on May 21, 1990, at the new Board's first meeting. (Declaration of Otis Warren, Defendants' Ex. 5). However, the minutes of the meetings indicate that the May 21, 1990 meeting was of the old CCB Board and the first meeting of the new Board occurred on June 20, 1990. (Defendants' Ex. 5).

[**7]

On September 20, 1990, the NCCB adopted a four tier rating system for faculty members carried over from CCB. The Vice President of the College would arrive at a recommended rating for each faculty member, based on evaluations by the faculty member's assistant dean, other faculty members, and students. Faculty members rated "poor" would be discharged at the end of the school year, June 30, 1990. Those rated "fair" would continue through the end of the year with another evaluation in the second semester. Faculty rated "good" were promised two years of employment. Faculty rated "excellent" would continue to be employed for three years. Only those faculty rated "poor" would be entitled to any type of hearing. All faculty members received their evaluations and ratings on December 7, 1990, and were informed about their rights to appeal. n3 Appeals were to have been filed by December 11, 1990. The panels to hear the appeals were to be selected at 2:00 p.m. on December 11, 1990. Panel hearings were scheduled for December 13, 14, and 15, 1990, at which time the faculty members would have their only opportunity to present witnesses and new documentary materials. The panels were to issue their [**8] decisions on December 17, 1990 at 9:00 a.m. If a faculty member wanted to further appeal the decision to the President, the appeal was to be filed within two hours, at 11:00 a.m. on December 17, 1990. The President would decide the appeal at 1:00 p.m. on the same day, and this decision would be final.

n3 Of the 96 faculty who were evaluated, 26 were rated as "excellent", 44 "good", 19 "fair" and 7 "poor." Six of the seven rated "poor" were tenured faculty at CCB.

On December 12, 1990, four faculty members of the College filed a complaint n4

[*283] and a motion for a temporary restraining order to prevent the College from continuing with the appeals procedure. Plaintiffs contended that the hearing process did not comport with due process because sufficient preparation time was not given, the rating system was not adequately explained, and the hearing would not address the rating itself but merely the fairness of the rating process. This Court granted plaintiffs a Temporary Restraining Order on December 14, 1990 after reviewing [**9] the parties' written submissions and considering the parties' oral arguments made at a hearing on December 13, 1990. The Order prohibited defendants from continuing the evaluation or appeals process and from terminating the employment of any faculty member who was tenured by the Community College of Baltimore.

n4 The Court was advised that plaintiffs would be filing a motion for class certification.

Subsequent to this Court's issuance of the Temporary Restraining Order, the defendants made adjustments to the original evaluation and appeals process. On December 19, 1990 the Board of Trustees of NCCB authorized President James D. Tschechtelin to ensure that all faculty would have continued employment through June 15, 1991 and to ensure that a new appeal process would be commenced that would address the plaintiffs' requests and provide them with more time. On the same day, the Board approved the President's recommended new appeals procedure. Under this procedure, on or about but not before January 7, 1991, all faculty [**10] would be notified anew of their respective evaluations. Faculty rated "excellent" would be offered new two year contracts for the academic years 1991-1992 and 1992-1993. Those faculty evaluated as "good" would be offered new one year contracts for 1991-1992. Faculty rated "fair" would be reevaluated in the Spring with the opportunity to then obtain a further contract. Faculty evaluated as "poor" would not be offered contracts beyond this academic year. The faculty members with "poor" ratings would have the opportunity to challenge the evaluations if, within ten days of receipt of the evaluation, they made a request for a hearing. A hearing would be held no sooner than fifteen days after it was requested. The Appeals Board would be comprised of five persons who had not participated in the appealing faculty member's evaluation. The panel would consist of a chair, two administrators, and two faculty members. The Appeals Board would give a written decision including a statement of reasons for its decision. The faculty member could further appeal the evaluation to the President by request for review within seven days of the Board's decision. The President would review the record and make [**11] a recommendation to the Board of Trustees. The Board of Trustees would then consider the recommendations of the President at a public meeting and "any affected faculty member" would be entitled to appear. (Defendants' Ex. 15). The Board of Trustees would then decide whether to adopt or reject the President's recommendation.

At a hearing held on December 21, 1990, plaintiffs argued that despite the changes in the appeals process, a preliminary injunction was needed. This Court decided that an injunction was no longer needed, since the College had made good faith efforts to give the faculty more time for appeal and had agreed to not terminate any faculty until June 30, 1991. The Court has been notified that the appeals process has now been completed. At least one faculty member's rating of "poor" has been sustained by the Board of Trustees and a notification of termination has been received.

On April 2, 1991, after a hearing, this Court certified a class action under *Fed. R. Civ. P. 23(b)(2)*, describing the plaintiff class as:

> All tenured faculty of the Community College of Baltimore who were carried on payroll as faculty of the New Community College of Baltimore at anytime between [**12] July 1, 1990 and December 31, 1990.

Paper No. 28.

II. LEGAL ANALYSIS

Summary judgment is appropriate when the supporting material shows that "there is no genuine issue as to any material fact

[*284] and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. Because the parties and the Court agree that there is no dispute as to material fact, the Court will directly address the legal issues presented.

A. *Is There a Substantial Federal Question*?

In their motion for summary judgment, defendants argue that this case should be dismissed because no substantial federal question is presented. Defendant argues that the complaint does not raise a substantial federal question under *Goldsmith v. Mayor of Baltimore, 837 F.2d 158 (4th Cir. 1988)*. In *Goldsmith*, plaintiff claimed that due process was violated by the Baltimore City Council's elimination of her position as Director of the Office of Financial Responsibility. In 1983, the City Council, through legislation, created the City Council Office of Financial Review, the Director of which would be subject to removal only for inefficiency, neglect of duty or misconduct. [**13] In 1985, the City Council enacted legislation abolishing the position of Director of the Office of Financial Responsibility, creating instead the Office of Councilmanic Services. The Fourth Circuit ruled that the district court lacked subject matter jurisdiction over the claim. The court reasoned:

> Approached from any angle, this case merely presents a conflict between a public officer and the city council which created her position. The Supreme Court has ruled time and time again that, under the federal constitution, a legislative body, including municipal councils, has the unfettered authority to create, alter and abolish such positions.

Id. at 161-162. The court relied on *Higginbotham v. Baton Rouge, 306 U.S. 535, 83 L. Ed. 968, 59 S. Ct. 705 (1939)*, a Contracts Clause challenge to the City of Baton Rouge's legislation abolishing the office of Commissioner of Public Parks and Streets. The Supreme Court rejected Higgenbotham's challenge because "a municipal council may remove at any time any official appointed or elected by the Council, or anyone employed by the Council to perform governmental functions." *Id. at 538.* The Fourth Circuit in *Goldsmith* [**14] also referred to *63A Am. Jur. 2d Public Officers and Employees § 31*, which provides in part:

> The power to create an office generally includes the power to modify or abolish it. Where the office is of legislative creation, the legislature may, unless prohibited by the Constitution, control, modify, or abolish it whenever such course may seem necessary, expedient or conducive to the public good.

Goldsmith, supra, at 161, n. 2. Contrary to defendants' assertions, the instant case does not present "parallel" facts to *Goldsmith* or *Higginbotham*. Both Goldsmith and Higginbotham were public officials performing governmental functions. Plaintiffs in the instant case are teachers at a public community college but perform no governmental functions. As such, they cannot be considered public officials. For example, the Maryland Court of Appeals has held that public school teachers are not public officials:

> It seems clear that a public school teacher would not qualify as a public official. A teacher is not required to take an official oath; he receives no commission; gives no bond; is not commonly thought of as an officer or occupant of an office; does not exercise sovereign [**15] powers of government in his own right although a teacher is given tenure through Art. 77 § 115 of the Ann. Code of Md. (1969 Repl. Vol.).

Duncan v. Koustenis, 260 Md. 98, 105, 271 A.2d 547 (1970).

Moreover, the plaintiffs' positions themselves have not been eliminated. Rather, tenure has been abrogated, and certain individual faculty members will be terminated based on their respective evaluations. Furthermore, unlike *Goldsmith* and *Higginbotham*, the faculty's positions were not directly created by legislation; nor were the faculty members elected officials. As discussed below, the plaintiffs had a contractual right to tenure. This Court believes that the claim in the instant case is

[*285] distinguishable from *Goldsmith* and raises a substantial federal question.

B. *Contracts Clause*

The plaintiffs argue that the State's legislation and/or the New Community College of Baltimore's actions under that legislation abolishing tenure are in violation of the Contracts Clause and the Due Process Clause. The first sentence of Article I, § 10 of the United States Constitution provides in part:

> No State shall . . . pass any Bill of Attainder, ex [**16] post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

U.S. Const., art. I, § 10.

To establish a violation of the Contracts Clause, plaintiffs must first show that the challenged statute substantially impaired a contractual relationship. Defendants argue that the faculty's tenure was not contractual but legislatively created and could at any time be abrogated under the State's broad police power over its own public officers. Plaintiffs counter that they had contractual rights to tenure which could not be abolished at the will of the legislature.

Under *United States Trust Co. v. New Jersey, 431 U.S. 1, 17, n. 14, 52 L. Ed. 2d 92, 97 S. Ct. 1505 (1977),* a contractual obligation can be created by statute. In particular, "[a] property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law." *Bishop v. Wood, 426 U.S. 341, 344, 48 L. Ed. 2d 684, 96 S. Ct. 2074 (1976).* Courts in Maryland have held that contractual obligations may be formed in the employment context even when such obligations are not embodied in a written contract. [**17] For example, under *Dahl v. Brunswick Corp., 277 Md. 471, 476, 356 A.2d 221 (1976),* contractual obligations can arise out of the employer's policy directives where the employee was aware of such policies.

In this case, the faculty's tenure rights were derived partly from the CCB By-laws and partly on a "Memorandum of Understanding" between the College and the teachers' union. In 1971, the By-laws of the Board of Trustees of the Community College of Baltimore, as approved by the City Solicitor's Office, provided:

> § 202.02 President and Faculty
>
> (1) Faculty members shall attain permanent tenure at the College in accordance with the following regulations:
>
> (a) The initial appointment, which shall be by written contract, shall be of a probationary nature . . .
>
> (c) Election to Tenure. The President may recommend to the Board the election to tenure of an educational staff member if he has satisfactorily completed not less than three years of probationary service. Election to tenure by the Board of Trustees of the College shall entitle the educational staff member to all the rights and privileges as provided by these By-laws, but shall not change a staff [**18] member's placement on the salary schedule.

1971 By-laws of the Board of Trustees of the Community College of Baltimore, § 202.02 (Defendants' Ex. 7). The By-laws also provided that the President shall recommend to the Board of Trustees "the suspension and/or dismissal of any faculty member who has attained tenure or whose term of appointment has not expired, for gross insubordination, incompetence and/or moral turpitude." *Id.* at § 202.03(3). Dismissal for other than moral turpitude required prior notice of one year. The faculty member was entitled to written notice of the grounds for dismissal. A tenured faculty member was entitled to a "trial" with "all requirements of *due process*." *Id.* at § 202.02(3)(b).

In the 1970's the faculty became unionized and the 1987 By-laws of the Board of Trustees, which were in effect when CCB became NCCB, provided:

> 1.6.2 Tenure
>
> The CCB tenure policies are those contained in the controlling current Memorandum of Understanding between the Board of Trustees and the Community College of Baltimore Faculty Federation,

[*286] Local 1980, AFT, AFL-CIO (the Union).

1987 By-laws of the Board of Trustees of the Community College of Baltimore, § 1.6.2 [**19] (Defendants' Ex. 8). The Memorandum of Understanding effective July 1, 1988 to June 30, 1990 contains much of the same language on tenure as the 1971 By-laws. The Memorandum provides that "faculty members will attain permanent tenure in the Unit in accordance with the following regulations." Memorandum of Understanding, the City of Baltimore, Community College of Baltimore Faculty Federation, Local 198-0 AFT, AFL-CIO, July 1, 1988-June 30, 1990, Article VII(I) (Defendants' Ex. 10). Those faculty hired prior to July 1, 1988 would be initially appointed by written contract and serve a five year term of probation. After this time, the President may recommend the faculty member's election to tenure. "Election to tenure by the Board of Trustees . . . will be as provided in the By-laws, but such election will not change a faculty member's placement on the salary schedule." *Id.* Faculty hired after July 1, 1988 would be eligible for tenure after six years of probationary employment.

Unlike the 1971 By-laws, the Memorandum does not detail the standards for discipline of tenured faculty. The Memorandum provides only that "no faculty member will be disciplined except for just cause." *Id.* [**20] at Article VIII(Q). The faculty member is entitled to written notice and may appeal any discipline through the union. Faculty with tenure at CCB were considered to have permanent tenure. Although the Memorandum of Understanding does not directly address this issue, according to the former Director of Personnel at CCB and the President of the NCCB, once granted tenure, a faculty member at CCB could not be removed except for gross insubordination, incompetence and/or moral turpitude. (Plaintiff's Ex. A, pp. 19-20; Plaintiff's Ex. B). The faculty member would be entitled to a full hearing before the Board of Trustees.

In summary then, under the By-laws and the Memorandum of Understanding, the Board of Trustees of CCB had the authority to grant tenure and fix the salaries of faculty. Initially, faculty were hired under written contracts. After several years of probationary employment, those teachers found to be qualified would be elected to tenure by the College's Board of Trustees. Faculty members granted tenure would be notified through a letter from the President. Each faculty was individually evaluated and elected to tenure. The totality of circumstances in this case suggests that [**21] the rights to tenure were of a contractual nature.

Defendants argue that any rights to tenure did not exist as of July 1, 1990, because the Memorandum of Understanding expired on that date. However, the Memorandum of Understanding was presumably not renewed because the State of Maryland was going to take over the College by that date. In any event, the Memorandum only sets forth certain employee rights and employment policies, and did not embody the entirety of the CCB employees' employment contracts. Further, defendants contend that the By-laws allowed the Board to terminate any faculty in the event of financial need. The By-laws provided:

> 1.6.0 Termination for Financial Exigency
> Termination of employment because of financial exigency should be demonstrably bona fide and is the ultimate determination of the President/subject to review by the Board of Trustees.

1987 By-laws of the Board of Trustees of the Community College of Baltimore, § 1.6.0 (Defendants' Ex. 8). The defendants argue that the termination letters sent out by CCB were under the authority of By-law 1.6.0. In essence, the defendants' position is that CCB ceased to exist after June 30, 1990, and the faculty members [**22] were terminated by the City on that date. Thus, defendants argue, when the State took over on July 1, 1990, the faculty members lost any rights to tenure they may have had at CCB.

Defendants rely on a decision in the Eighth Circuit, *Leftwich v. Harris-Stowe State College Bd. of Regents, 540 F. Supp. 37 (E.D.Mo. 1982), aff'd in part and rev'd*

[*287] *in part, 702 F.2d 686 (8th Cir. 1983),* which held that a former professor's interest in continued employment did not transfer to the new state college following transfer of control and management of the college from the St. Louis Board of Education to the state college system. The district court in *Leftwich* ruled:

> In this situation, the Board of regents is not the employer under which the plaintiff acquired this property right in continued employment. The St. Louis School Board under which the plaintiff had a property interest, transferred all control over Harris-Stowe College to the control of the Board of Regents. Even though the State of Missouri ultimately governs both of these Boards, each is a separate operating entity, empowered by the State to govern and control itself, see §§ 162.571 R.S.Mo. [**23] 1978, including employing staff for schools under their government and control. Even though little change may have occurred as a result of the transfer of control between the St. Louis Board and the Board of Regents, the fact remains that the control and government did change. The Board of Regents is not the same employer as the St. Louis Board of Education. Therefore, the property interest in continued employment does not transfer to the new state college.

Id. at 44. A similar situation is presented in the CCB case, where a college controlled by a locally appointed board transfers control to the State of Maryland. Plaintiffs argue that CCB was and continues to be governed by the State and that NCCB is not really a "new" college at all. Maryland courts have ruled that community colleges are created and controlled by the State and that the boards of community colleges are agencies of the State. In *Board of Trustees v. John K. Ruff, Inc., 278 Md. 580, 366 A.2d 360 (1976),* the Maryland Court of Appeals stated:

> We note that the State Board for Community Colleges is charged with establishing general policies for the operation of [**24] the State's community colleges and must report annually to the General Assembly on the activities of the colleges, Code (1957, 1975 Repl. Vol., 1976 Cum. Supp.) Art. 77A, § 8(d). Powers enjoyed by the boards of trustees of community colleges are bestowed by public general laws. Art 77A, § 1(a)-(m). Each community college is financed, up to certain maximum amounts, by State, local, and federal funds, but 50% of its current expenditures are received from the State. Art. 77 A, § 7. . . . In short, . . . there is no doubt that the Board of Trustees of Howard County Community College is an agency of the State.

Id. at 587. However, while the authority of the old CCB board was ultimately derived from the State of Maryland, clearly control and government of the College has now changed. Moreover, unlike boards of other community colleges in Maryland, the CCB Board was appointed by the Mayor and City Council of Baltimore; the new Board of NCCB is appointed by the Governor of Maryland and subject to the advice and consent of the Maryland Senate. To distinguish their case from *Leftwich*, plaintiffs further point out that the faculty of Harris-Stowe College [**25] were all terminated and only those who applied to teach at the new college were considered for employment. At CCB, on the other hand, all CCB faculty were continued at NCCB unless they resigned. Thus, the faculty argue, they had a continued expectation that their permanent tenure rights would be protected.

The Court observes that this case presents a somewhat different problem from *Leftwich. Leftwich* involved a due process challenge to the loss of employment, not a Contracts Clause challenge. The court in that case never considered whether the State's action violated the Contracts Clause. In the CCB case, it could be argued that it was the State's action which abolished tenure, regardless of whether tenure rights transferred to NCCB. n5 However,

[*288] even assuming that the Court can reach the Contracts Clause issue in this case, the plaintiffs' challenge must fail.

> n5 The termination of CCB employees was done under the dictates of the Maryland statute. While the statute does not specifically state that employees of CCB will be terminated, the statute does say that former CCB employees will be offered employment at NCCB from July 1, 1990 to through December 31, 1990. The Floor Report of the Economic and Environmental Affairs Committee on House Bill 381 provides:
>
> > In the agreement between the City of Baltimore, the Board of Trustees of the current CCB, and the Board of Trustees of the New Community College of Baltimore, it will be agreed that the City will terminate the employees of the current CCB effective June 30, 1990.
>
> Defendant's Ex. 3, p.1.

[**26]

As discussed above, the plaintiffs had a contractual right to permanent tenure at CCB. The "threshold inquiry" in a Contracts Clause claim is whether the challenged statute operates as a "substantial" impairment of a contractual relationship. *Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400, 413, 74 L. Ed. 2d 569, 103 S. Ct. 697 (1983).* The Maryland statute in this case clearly results in substantial impairment of the faculty's contract rights. The Supreme Court has held that college professors may have a protected property right in continued employment even absent tenure or a formal contract. *See Board of Regents v. Roth, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972); Perry v. Sindermann, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972).* In the instant case, faculty had permanent tenure and were removable only for good cause, understood to be incompetence, gross insubordination, and/or moral turpitude. Now under NCCB, the faculty no longer have the same type of job security. Rather, they have at most a three year contract, and some will be terminated as soon as June 30, 1991.

When a State has substantially impaired private contractual obligations, the legislation must serve a legitimate [**27] public purpose. *United States Trust Co. v. New Jersey, 431 U.S. 1, 22, 52 L. Ed. 2d 92, 97 S. Ct. 1505* (citing *Home Building and Loan Ass'n v. Blaisdell, 290 U.S. 398, 444-45, 78 L. Ed. 413, 54 S. Ct. 231 (1934)).* Moreover, the legislation must be "upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *Id.* (citing *Blaisdell, supra, at 445-47).* However, when a State impairs a private contract, "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Id.* at 22-23 (citation omitted).

On the other hand, the Supreme Court has ruled that when a State modifies its own contractual obligations, the courts must more carefully scrutinize the legislation:

> The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest [**28] is at stake.

United States Trust Co. v. New Jersey, supra, at 25-26.

Thus, this Court must determine whether the legislation at issue impaired a private contract or the State's own contract. In this case, CCB was a Baltimore City institution, operating with substantial State funds. As discussed above, CCB operated under the laws governing community colleges in Maryland. Certainly the employment contracts between the faculty and CCB were public, not private, contracts. While the City and the State are not the same entities, the Board of the Community College of Baltimore could be considered an agency of the State, like the Board of the Howard Community College. *See Board of Trustees v. John K. Ruff, Inc., supra.* n6 Furthermore, although the employment contracts between CCB and its employees were not made directly by the State, the State's financial self-interest was at stake in deciding to abolish permanent

[*289] tenure. Thus, this case does not present the typical situation where state legislation modifies a contract between two private parties. Therefore, the Court will analyze the Contracts Clause claim under the higher standard [**29] of "reasonableness and necessity" as set forth in *United States Trust*.

> n6 The Court notes, however, that the Board at CCB was appointed by the Mayor and City Council of Baltimore, unlike other community colleges where the Governor of Maryland appoints members of the Board.

Even under this closer scrutiny, however, the Court cannot conclude that the Maryland General Assembly or the actions of the New Community College of Baltimore violated the Contracts Clause. The Maryland legislature had legitimate concerns about the viability of CCB. Plaintiffs argue, however, that the complete abrogation of tenure was not necessary. Given the fact that the legislature had concerns about the curriculum offered at CCB and the ability of the College to service the needs of the community, this Court cannot say that it was unreasonable for the legislature to decide to abolish tenure and reevaluate the faculty to decide which teachers to retain. The State assumed financial responsibility for a city college and wanted to create a new [**30] institution while maintaining the facilities and employees of the old college during the transition. The Court concludes that the 1990 Act was a reasonable response to an important public concern.

Plaintiffs contend that total abolishment of tenure was not "necessary." To determine whether the modification of contractual obligations was necessary, the court must "consider the nature of the modification." *Maryland State Teachers Ass'n v. Hughes, 594 F. Supp. 1353, 1370 (D. Md. 1984)* (citing *United States Trust Co., supra)*. "[A] State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." *United States Trust Co., supra, at 31*. Plaintiffs argue that abrogation of tenure has not resulted in financial benefits to the College since almost all CCB faculty will be retained after the evaluation and new faculty are being hired. Financial concerns, however, were not the only reason that the State took over CCB and created NCCB. In its "Findings and policies" the statute provides:

> There is a need for an effective comprehensive urban community college in Baltimore City offering educational [**31] programs that will stimulate participation of individuals, be responsive to the needs of the community, and afford open access to individuals with a variety of educational backgrounds.

Md. Educ. Code Ann. § 16-601(b)(2) (Supp. 1989). The statute further explains that Baltimore's business community is in economic transition and the State and business community need to work together to ensure a "quality institution that is responsive to the technological and continuing education needs of businesses." *Id.* at § 16-601(b)(6). The statute also recognizes a need for improvement in the College's governance structure as well as the "quality and range of academic programs and services." *Id.* at § 16-601(b)(5). These same concerns about the quality of education at CCB are evident in the Floor Report of the Economic and Environmental Affairs Committee on House Bill 381. (Defendants' Ex. 3). Given these concerns, the Court concludes that the modifications in the faculty's employment rights were necessary to achieve the State's important public purpose of ensuring that Baltimore City has a community college that meets the needs of the students and the community at large. In reaching this conclusion, [**32] the Court observes that the State chose less drastic means of creating a new college than it might have. The State retained for at least one year all the CCB professors who wanted to stay on. The faculty are no longer tenured, but based on their performance, they are offered contracts for an additional one, two, or three years.

Moreover, it is important to note that the legislation provides that the New Community College of Baltimore will only continue to operate for three years unless legislation is passed to continue the institution. Thus, the entire NCCB is in a trial stage and the whole College, including the faculty, is in a process of evaluation. Based on the record before this Court, including the legislature's stated purposes behind the challenged legislation, this Court concludes

[*290] that the 1990 Act creating the New Community College of Baltimore is reasonable and necessary to serve an important public purpose and does not violate the Contracts Clause of the United States Constitution.

C. *The Due Process Claim*

As for plaintiffs' due process claims, under the reasoning of *Leftwich, supra,* plaintiffs have no due process rights because "the property interest in [**33] continued employment does not transfer to the new state college." *Leftwich, supra, at 44.* Even assuming *arguendo* that the faculty's property interest in continued employment at CCB was transferred to NCCB, it appears that the new improved hearing and appeals process would comport with any due process requirements. n7 The due process requirements for terminating a public employee who can only be terminated for cause are set forth in *Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985).* In *Fields v. Durham, 909 F.2d 94 (4th Cir. 1990),* the Fourth Circuit applied the analysis of *Loudermill* to the case of a tenured faculty member of the Community College of Baltimore who was appointed Dean and Provost of the College in 1978 and dismissed from the College in 1986. Prior to termination, the tenured public employee is entitled to (1) oral or written notice of the charges, (2) an explanation of the employer's evidence, and (3) an opportunity to present his or her side of the story. *Id. at 97* (quoting *Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985)).* In the *Fields* case, [**34] the Fourth Circuit held that "the substantial process provided to Fields more than satisfied the requirements of *Loudermill." Id.* at 97-98. Fields was notified of his deficiencies and told of his right to appeal his dismissal to the President's Cabinet. Instead, Fields sought direct review before the Board of Trustees. At the hearing before the Board, Fields was represented by counsel, produced witnesses, and had the opportunity to testify and cross-examine witnesses. His termination was affirmed by the Board.

n7 The appeal procedures available to the faculty are summarized [slip op.] on pp. 7-8, *supra,* and set forth in the "New Community College of Baltimore Revised Faculty Evaluation Procedures" (Defendants' Ex. 15).

Like the appeals process afforded to Fields, the hearing and appeal provided to faculty members rated "poor" by NCCB meets all the requirements of due process. Faculty have been given written notice of their evaluations and their rights of appeal. The College has explained to the faculty the method by [**35] which the evaluations were performed. All faculty members may obtain copies of his or her portfolio and peer, dean, and student rating sheets. (Defendants' Ex. 15, p. 1). Any faculty member rated "poor" is given an opportunity for a hearing before the Appeals Board, at which time the faculty member has an opportunity to testify, present witnesses, and be accompanied by a representative. (Defendants' Ex. 15, p. 4). The faculty member may further appeal to the President any adverse decision of the Appeals Board. The President makes the final recommendation to the Board of Trustees, and the affected faculty member may appear at the trustees' meeting. Faculty rated "good" or "excellent" are not afforded any hearing; but since they are not subject to impending termination, a hearing is not required.

Thus, even assuming that plaintiffs had a continued protected interest in employment and could only be fired for cause, the notice and procedures afforded to the faculty clearly comport with the requirements of due process.

III. CONCLUSION

Having carefully considered the written submissions and oral arguments of the parties, it is the judgment of this Court that the legislation creating [**36] the New Community College of Baltimore does not violate the Contracts Clause of the United States Constitution and that the new improved hearing and appeals process comports with the requirements of due process. Accordingly, the Court will by separate order deny the

[*291] motion of plaintiffs for summary judgment and grant the motion of defendants for summary judgment.

ORDER

In accordance with the foregoing Memorandum, it is this 11th day of June, 1991, by the United States District Court for the District of Maryland,

ORDERED:

(1) that plaintiffs' Motion for Summary Judgment be, and the same hereby is, Denied;

(2) that defendants' Motion for Summary Judgment be, and the same hereby is, Granted;

(3) that judgment be, and the same hereby is, Entered in favor of defendants;

(4) that the Clerk of the Court shall Close this case; and

(5) that the Clerk of the Court shall mail a copy of this Order with the accompanying Memorandum to the parties.

LEXSEE 698 F2D 606

DENNIS GOETZ, Plaintiff-Appellant, v. WINDSOR CENTRAL SCHOOL DISTRICT, JERALD K. QUIMBY, Superintendent of Schools, Officially and in his individual capacity, ELLEN R. SKOVIERA, School Business Executive, Officially and in her individual capacity, JAMES DECKER, Supervisor, Officially and in his individual capacity, LEO MULCAHY, Supervisor, Officially and in his individual capacity, Defendants-Appellees

Docket No. 82-7521, No. 485 — August Term, 1982

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

698 F.2d 606; 1983 U.S. App. LEXIS 31123

December 9, 1982, Submitted
January 24, 1983, Decided

PRIOR HISTORY: [**1]

Appeal from a grant of summary judgment by the United States District Court for the Northern District of New York (McCurn, J.) dismissing appellant's § 1983 action for alleged deprivation of property and liberty interests resulting from his discharge as an employee of the Windsor Central School District.

DISPOSITION:

Affirmed in part, reversed and remanded in part.

LexisNexis(R) Headnotes

COUNSEL:

Ronald R. Benjamin, Binghamton, New York, filed a brief for Plaintiff-Appellant.

Frank W. Miller, Binghamton, New York (, Couglin & Gerhart, Binghamton, New York, of counsel), filed a brief for Defendants-Appellees.

JUDGES:

Kaufman, Timbers and Cardamone, Circuit Judges.

OPINIONBY:

CARDAMONE

OPINION:

[*607] CARDAMONE, Circuit Judge:

Alleging a deprivation of property and liberty interests without due process of law, Dennis Goetz commenced this action under *42 U.S.C. § 1983* against the Windsor Central School District [School District] and four of its officials. The officials Jerald Quimby, Superintendent of Schools, Ellen Skoviera, School Business Executive, James Decker, Supervisor and Leo Mulcahy, Supervisor, were sued in both their official and individual capacities. The United States District Court for the Northern [**2] District of New York (McCurn, J.) granted defendants' motion for summary judgment. We affirm as to the claimed deprivation of a property interest and reverse and remand to permit discovery on the claimed deprivation of a liberty interest.

FACTS

In October 1979 the School District appointed Dennis Goetz to the position of "cleaner." One year later School District officials became aware of a series of thefts which had been occurring at the district offices. The New York State Police were notified and a formal investigation commenced. Shortly thereafter plaintiff was arrested and charged with third degree burglary.

On January 10, 1981 Goetz was suspended by the School District because of his alleged participation in these break-ins. Two days later Skoviera sent Goetz a letter requesting a full written explanation of his involvement in the matter. Goetz's application for an extension of time to respond

[*608] was granted by Skoviera, but the record indicates that he never responded to Skoviera's letter. On January 19, 1981 plaintiff, through the attorney representing him in the criminal proceedings, wrote Skoviera indicating that Goetz had been suspended without an opportunity [**3] to be heard, in violation of his constitutional rights, and requesting an opportunity to be heard. However, as a result of not receiving a written explanation from Goetz, the School District terminated his employment on January 22. No information regarding the reasons for Goetz's termination from employment was placed in his personnel file.

On January 12, the same day that Skoviera wrote Goetz, she also circulated a memo to Supervisors Decker and Mulcahy directing that they and their staffs maintain the strictest confidentiality regarding the recent events at the School. No direct mention of Goetz was contained in that memo.

In March 1981 the burglary charge against plaintiff was reduced to a misdemeanor and he was granted an adjournment in contemplation of dismissal pursuant to *New York Criminal Procedure Law § 170.55* (McKinney 1982).

On October 6, 1981 plaintiff instituted the present action charging that defendants had deprived him of property and liberty interests without due process of law. Granting a defense motion for summary judgment, the district court held that plaintiff possessed no protectable property interest under either New York law or the terms of his collective [**4] bargaining agreement, and that plaintiff had not demonstrated a protected liberty interest because he was unable to show that the defendants publicized the allegedly false and defamatory information. In light of his summary rejection of plaintiff's claims, the district judge found discovery to be unnecessary. The trial court also held that plaintiff had been given an opportunity to be heard under the terms of the collective bargaining agreement, but had declined to exercise that right. It also denied, as moot, plaintiff's motion to add former School District Attorney John Hogan as a party defendant. Plaintiff appeals from the grant of summary judgment and denial of his motion to add Hogan as a defendant.

PROPERTY INTEREST

Before one may be deprived of property the Fourteenth Amendment mandates that the dictates of due process be satisfied. Some property interest must exist in favor of the person seeking shelter under the Amendment's broad umbrella. In deciding whether a person possesses a property interest a court must carefully sift through abstract needs and unilateral expectations until it locates a legitimate claim of entitlement. *Board of Regents v. Roth, 408 U.S. 564, 577,* [**5] *33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972).* The source of such interests are not to be found in the Constitution. Rather their existence and dimensions are defined by "existing rules or understandings that stem from an independent source such as state law–rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* Thus, a property interest in employment can be created by local ordinance or by implied contract. *Bishop v. Wood, 426 U.S. 341, 344, 48 L. Ed. 2d 684, 96 S. Ct. 2074 (1976).* In either case, the sufficiency of the claim of entitlement rests on state law.

Plaintiff concedes that he possesses no protectable property interest under New York State's Civil Service Law. His position of "cleaner" is classified in the regulations as an unskilled labor position covered by section 42 of the Civil Service Law (McKinney 1973). 4 N.Y.C.R.R. App. 3 (1982). New York law provides that after five years of service such employees may only be removed for incompetency or misconduct and must be afforded a hearing before removal. *N.Y. Civ. Serv. Law § 75* (McKinney 1973). As an unskilled laborer with less than five years of service plaintiff's [**6] position was one terminable at will.

Supreme Court cases make clear that at will employees possess no protectable property interest in continued employment.

[*609] In *Roth*, the Court noted that a person may possess a protected property interest in public employment if contractual or statutory provisions guarantee continued employment absent "sufficient cause" for discharge. *408 U.S. at 578.* Even a *de facto* system of tenure, if proved, is sufficient to create a property interest. *See Perry v. Sindermann, 408 U.S. 593, 602-03, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972).* In *Arnett v. Kennedy, 416 U.S. 134, 40 L. Ed. 2d 15, 94 S. Ct. 1633 (1974)* the issue was how much due process should be accorded a nonprobationary federal employee who could be discharged only for cause. The plurality held that when an employee may only be removed for cause a statutory expectancy exists which creates a property interest in favor of the employee. *Id. at 151-52.* The concurring opinion reached essentially the same result — "no property interest [is] conferred . . . where the applicable statutory or contractual terms, either expressly or by implication, [do] not provide for continued [**7] employment absent 'cause. '" *Id. at 167 n.2* (Powell, *J.* concurring). Taking this analysis to its logical conclusion the Supreme Court in *Bishop* upheld a finding of no protected property interest where, under state law, the employee "held his position at the will and pleasure of the [employer]." *426 U.S. at 345. See also White v. Mississippi State Oil and Gas Board, 650 F.2d 540, 542 (5th Cir. Unit A 1981); Beitzell v. Jeffrey, 643 F.2d 870, 874 (1st Cir. 1981).*

Plaintiff urges that a property interest arises from Article 9 of his collective bargaining agreement which provides that:

> In the case of employee release, at least one-day notice of release and reasons for such action to incorporate evaluation reports will be given to the employee. The employee, if he/she feels such reasons for release are essentially inadequate or inaccurate, may request an immediate audience with the Chief School Administrator, or his designee, to explain his/her reasons for contradicting the release order.

Goetz argues that where reasons for discharge must be provided to the employee, as here, the employer must come forward and justify the termination. He claims that [**8] the collective bargaining agreement changed his status from an employee who served at will to one who could be discharged solely for cause. For this contention plaintiff relies upon *In re King v. Sapier, 47 A.D.2d 114, 364 N.Y.S.2d 652* (4th Dep't 1975), *aff'd, 38 N.Y.2d 960, 384 N.Y.S.2d 152, 348 N.E.2d 609 (1976).*

In our view neither *King* nor the collective bargaining agreement supports plaintiff's argument. *King* dealt with the requisite notice to be afforded a probationary state employee under New York's Civil Service regulatory scheme. The court found little justification for expanding the notice requirement of Section 4.5 of the Rules and Regulations of the Department of Civil Service to include notice of unsatisfactory performance "when, in the status which he then occupies, the probationer may not compel the appointing authority to justify the termination." *King, 47 A.D.2d at 117.* As the court in *King* recognized, it is the employee's *status* which determines whether he has a legitimate expectation of future employment. The mere fact that an employer may be required to notify an employee of the reasons for discharge does not alter the employee's status. [**9] While a collective bargaining agreement may add to an employee's procedural rights, and even create a property interest in continued employment, nothing in the relevant agreement altered Goetz's status as an at will employee. Because he possessed no property interest in his employment, plaintiff's claim that he was denied due process of law for lack of a hearing must fail.

LIBERTY INTEREST

Liberty as guaranteed by the Fourteenth Amendment denotes the right of the individual to engage in the common occupations of life and to enjoy privileges recognized as essential to the orderly pursuit of happiness. *Board of Regents v. Roth, 408 U.S. at 572.*

[*610] Under the Constitution its meaning must be "broad indeed." *Id.* A liberty interest is therefore implicated and a name-clearing hearing required where an employer creates and disseminates a false and defamatory impression about an employee in connection with the employee's termination. *See Codd v. Velger, 429 U.S. 624, 628, 51 L. Ed. 2d 92, 97 S. Ct. 882 (1977); cf. Bishop v. Wood, 426 U.S. at 348* (where defamatory information connected with a discharge is not made public it cannot form the basis of a liberty interest [**10] claim); *Paul v. Davis, 424 U.S. 693, 709-10, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976)* (defamation by state official does not give rise to § 1983 claim where it did not occur in the course of termination of employment). In viewing this record there is no question but that the allegation that plaintiff is a thief is stigmatizing information which arose in connection with plaintiff's discharge. The factual issue as to whether this information is true or false cannot be resolved on a motion for summary judgment. Thus, plaintiff should be prevented from proceeding with his case at this stage of the litigation only if defendants have conclusively demonstrated that they did not disseminate the stigmatizing impression that plaintiff was fired because he is a thief. *See Codd v. Velger, 429 U.S. at 628.*

In this connection defendants supplied affidavits attesting to their efforts to keep the defamatory information secret. Plaintiff, on the other hand, presented affidavits indicating that many of his fellow townspeople were fully aware of the allegation of thievery. Some of the information concerning thievery may have arisen from the public nature of plaintiff's arrest and handcuffing [**11] while on school premises. It may well turn out that the public in this small community came upon this stigmatizing impression from sources other than the defendants; but, alternatively, it may be established that school district employees or board members were in fact responsible for public awareness of the allegedly defamatory charge made against plaintiff. If so, notice and an opportunity to be heard are essential to protect his due process rights. *See Wisconsin v. Constantineau, 400 U.S. 433, 437, 27 L. Ed. 2d 515, 91 S. Ct. 507 (1971).*

We are satisfied that, granting plaintiff every reasonable intendment to be derived from the allegations in his papers opposing summary judgment, he has raised factual issues regarding the deprivation of a liberty interest which may not properly be resolved without benefit of discovery. Plaintiff should be permitted to depose defendants and otherwise seek discovery on the issue of public dissemination of the stigmatizing impression allegedly circulated by defendants. *See generally Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 446-47 (2d Cir. 1980).*

We hold, finally, that plaintiff's failure to take advantage of the opportunity [**12] to provide an explanation for his alleged involvement in this affair does not constitute a waiver of his right to assert a due process claim. If it is found that Goetz was deprived of a liberty interest, he may well be entitled to more due process than the procedure under the collective bargaining agreement afforded him. Failure to take advantage of that procedure may not, therefore, be interpreted as a waiver of the full due process to which he would be entitled.

The matter is remanded therefore for further proceedings consistent with this opinion with the added direction that the district court reconsider plaintiff's motion to amend his complaint since that issue is no longer moot.

1996 WL 440551 (D.D.C.)

Motions, Pleadings and Filings

United States District Court, District of Columbia.
Ricardo C. JENKINS, Plaintiff,
v.
The GOVERNMENT OF the DISTRICT OF COLUMBIA, et al., Defendants.
Civil Action No. 94-0995 (GK).
July 26, 1996.

Ricardo C. Jenkins, Lorton, VA, Pro Se.
Sherman Bernard Robinson, Office of Corporation Counsel, Washington, DC.

MEMORANDUM OPINION

KESSLER, District Judge.
***1** This case is before the Court on Defendants' Motion to Dismiss for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6). Plaintiff, a prisoner, filed this complaint against the D.C. Department of Corrections Medical Unit ("Medical Unit") and against the Government of the District of Columbia, alleging that because the Medical Unit failed to notify him of the results of a 1990 blood test, he was not treated for syphilis for three and 1/2 years. Plaintiff seeks $5 million in damages.
I. *Background*
Plaintiff is currently an inmate at the Lorton Correctional Complex, Lorton, Virginia. Plaintiff was incarcerated on September 14, 1990, and shortly thereafter underwent a medical examination at the D.C. Department of Corrections Medical Unit. During the course of that examination, Plaintiff was tested for HIV. Plaintiff alleges that the Department of Corrections lost that record and that he was never informed of the test results. Three and 1/2 years later, in March of 1994, following months of illness, Plaintiff was tested for HIV again, allegedly at his request. That test indicated that Plaintiff was HIV negative, but that he was infected with syphilis.
Plaintiff contends that as a result of the District's failure to inform him of his 1990 test results, there was a three and 1/2 year delay in his treatment for syphilis. Plaintiff is suing the District for $5 million for present and future pain and suffering caused by that delay, and for the possibility that he will eventually go blind.
Plaintiff filed this complaint *pro se* and *in forma pauperis* against both the Government of the District of Columbia and the Medical Unit. Plaintiff's claims are a bit unclear, but the Court must liberally construe *pro se* pleadings, giving the Plaintiff "the benefit of all inferences that can be derived from the facts alleged." *Schuler v. United States,* 617 F.2d 605, 608 (D.C.Cir.1979) (citation omitted). Reading the complaint under this standard, Plaintiff alleges that Defendants' failure to provide prompt medical diagnosis and treatment violated 42 U.S.C. § 1983. [FN1] Specifically, Plaintiff alleges that Defendants violated (1) the Eighth Amendment's prohibition against cruel and unusual punishment; (2) Plaintiff's right to Due Process under the Fourteenth Amendment; and (3) Plaintiff's right to Equal Protection under the Fourteenth Amendment. Plaintiff also alleges a violation of District of Columbia law, namely, that Defendants' violated the standard of due care owed to prisoners under D.C.Code § 24-442.

FN1. The text of 42 U.S.C.1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. 42
>
> U.S.C. § 1983 (1988).

Defendants filed a Motion to Dismiss on February 17, 1995. Although Plaintiff timely responded, chambers overlooked Plaintiff's Opposition, and the Government's Motion was granted, as conceded, on June 30, 1995. Plaintiff appealed the Court's June 30, 1995 Order, and in May 1996, the Court of Appeals remanded the case.
This matter is back before the Court upon Defendants' Motion to Dismiss, pursuant to Fed.R.Civ.P. 12(b)(6). Defendants argue that Plaintiff has failed to state a claim because: (1) Plaintiff has not established that he was deprived of a constitutionally protected right; (2) Plaintiff has, at most, alleged medical negligence, which is not a constitutional claim and will not support a claim under 42 U.S.C. § 1983; (3) the D.C. Department of Corrections is non-sui juris. [FN2]

> FN2. It is well established in this Circuit that agencies and departments within the District of Columbia government are not suable as separate entities. *Fields v. District of Columbia Department of Corrections*, 789 F.Supp. 20, 22 (D.D.C.1992); *Roberson v. District of Columbia Bd. of Higher Educ.*, 359 A.2d 28, 31 n. 4 (D.C.1976); *Braxton v. Nat'l Capital Housing Auth.*, 396 A.2d 215, 216 (D.C.1978). Because the
>
> Medical Unit of the D.C. Department of Corrections is an agency and organizational subdivision of the government of the District of Columbia, it is non-sui juris. Accordingly, the complaint against the Medical Unit is dismissed.

***2** Upon consideration of the Defendants' Motion, Plaintiff's Responses, and the relevant case law, the Court concludes that Defendants' Motion must be granted.
II. *Standard of Review*
"[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The factual allegations of the complaint must be presumed true and liberally construed in favor of the plaintiff. *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1506 (D.C.Cir.1984).
III. *Discussion*
In order to state a cause of action against a municipality under Section 1983, Plaintiff must allege that (1) the conduct was committed by a person acting under the color of state law; (2) this person deprived Plaintiff of rights, privileges or immunities guaranteed by the Constitution or the laws of the United States; and (3) the person was acting pursuant to a policy statement, ordinance, regulation, or decision officially adopted and promulgated by a municipality's officers, or a governmental "custom." *Monell v. Dep't of Social Services of the City of New York et al.*, 436 U.S. 658, 690

(1978).

1. Acting Under Color of State Law Requirement

The employees of the Department of Corrections Medical Unit were acting as officials of the District of Columbia when they drew Plaintiff's blood. As District of Columbia officials, they were persons acting under the color of state law. *West v. Atkins,* 487 U.S. 42, 49-50 (1988) (a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities under state law) (citing *Lugar v. Edmonson Oil Co.,* 457 U.S. 922, 935, n. 18 (1982) ("state employment is generally sufficient to render a defendant a state actor")). Accordingly, the Court finds that Plaintiff has satisfied the first prong of the Section 1983 test. This finding applies to each of Plaintiff's claims below.

2. Eighth Amendment Claim

In order to state a cognizable claim under the Eighth Amendment, Plaintiff must allege acts or omissions "sufficiently harmful" to evidence "deliberate indifference" to the prisoner's "serious medical needs." *Estelle v. Gamble,* 429 U.S. 97, 104 (1976). This standard requires the Court to examine (1) the effect of the injury/loss to the Plaintiff and (2) the intent of the state official. *Pryor-El v. Kelly,* 892 F.Supp. 261, 266 (D.D.C.1995).

A medical condition qualifies as serious if it is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Charles 2X (Cox) v. District of Columbia,* 834 F.Supp. 439, 441, (D.D.C.1992) (citing *Ramos v. Lamm,* 639 F.2d 559, 575 (10th Cir.1980)). In the instant case, Plaintiff's medical condition qualifies as serious. Plaintiff has been diagnosed with syphilis, a communicable disease that can ultimately cause blindness if left untreated. *Cf. Cox* at 440-443, (patient diagnosed with Glaucoma, a degenerative disease of the optic nerve which ultimately leads to blindness, was found to have a serious medical condition); *Johnson-El v. District of Columbia,* 579 A.2d 163, 169 (D.C.App.1990) (prisoner who was experiencing hair loss caused by a scalp problem was found to have a serious medical condition).

***3** An Eighth Amendment claim also requires, however, that the prison official show deliberate indifference to the prisoner's medical condition. *Pryor El,* 892 F.Supp. at 267 (citing *Helling v. McKinney,* 509 U.S. 25, 35 (1993)). Deliberate indifference is manifested when prison officials deny, delay or intentionally interfere with a prisoner's medical treatment. *Estelle,* 429 U.S. at 104-105. Allegations that a defendant purposefully ignored or failed to respond to a prisoner's pain will state a cause of action under the Eighth Amendment. *See McGuckin v. Smith,* 974 F.2d 1050, 1059 (9th Cir.1992) (delay of surgery despite diagnosis of a herniated disk and ongoing complaints of pain by Plaintiff stated cause of action under the Eighth Amendment). Allegations of negligent medical treatment alone, however, do not state an Eighth Amendment claim. *Estelle,* 429 U.S. at 105-106.

In this case, Plaintiff has, at most, alleged negligence. Plaintiff has alleged no facts which indicate that Defendants' failure to provide treatment was deliberate. Plaintiff never alleged that he complained of discomfort, pain, or other symptoms which would indicate to Defendants' medical personnel that he was infected with syphilis or that he should have further blood tests. Moreover, Plaintiff does not allege that he (1) informed prison officials of his disease; nor (2) requested treatment for his condition, despite the fact that he apparently had known since 1983 that he was infected with syphilis. [FN3] In short, Plaintiff has made no allegation or showing that prison officials knew of his condition or need for care. *See Johnson-El,* 579 A.2d at 168 (a plaintiff states a § 1983 claim for deliberate indifference by alleging that officials knew of the prisoner's need for medical care but intentionally ignored it).

FN3. In a document filed by Plaintiff on June 6, 1996, entitled "Procedural Motion," Plaintiff states that he was told in 1983 that he had

syphilis.

Furthermore, as noted above, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim under the Eighth Amendment. Medical malpractice does not rise to the level of a constitutional violation merely because the victim is a prisoner. *Estelle,* 429 U.S. at 106; *Fields,* 789 F.Supp. at 23. Nor does a delay in providing medical treatment, without more, amount to a constitutional violation of Eighth Amendment rights. *Cox,* 834 F.Supp. at 442.
Even if Plaintiff could establish deliberate indifference, Plaintiff fails the third prong of the Section 1983 test, namely, that an official policy or custom of the District of Columbia caused a deprivation of his rights. The Supreme Court has held that local governing bodies can be sued under Section 1983 only where the action implemented a policy officially adopted by the body's officers or was the result of a widely accepted governmental custom. *Monell,* 436 U.S. at 690. Here, Plaintiff has not alleged that a persistent or pervasive practice caused the city to delay in providing him treatment. Plaintiff also has failed to plead any facts which would indicate that the District had a policy aimed at permitting inmates to harbor sexually transmitted diseases (STDs) without receiving treatment, or that the Government had a policy to provide inadequate care to an inmate who tested positive for an STD. [FN4] Because Plaintiff has not identified a custom or official policy which was the moving force behind the government's actions, he has failed to state a claim under Section 1983. *Miller v. Barry,* 698 F.2d 1259, 1261 (D.C.Cir.1983).

> FN4. The fact that the Plaintiff is now receiving treatment for his disease suggests that there was no such policy motivating Defendants.

***4** In summary, Plaintiff has failed to state a cognizable claim under the Eighth Amendment.
3. Fourteenth Amendment Due Process Claim
Plaintiff also asserts a Due Process claim on the basis that he was not timely informed of his 1990 blood test results. In order to establish a claim for a Due Process violation under Section 1983, a prisoner must establish that (1) he had a liberty or property interest with which the State interfered; (2) the State acted intentionally. *Daniels v. Williams,* 474 U.S. 327, 328-331 (1986). Here, Plaintiff has alleged neither.
Even if Plaintiff could point to a substantive right that the District violated, his claim would still fail because he has not shown that the Defendant acted intentionally. Plaintiff has at most alleged negligence, and a negligent act by an official which causes unintended loss or injury to life, liberty, or property does not trigger due process protections. *Id.* at 328 (Court rejected Petitioners claim that he was negligently denied liberty interest in being free from bodily injury where he slipped on a pillow left on the stairs by correctional officers). Although a lack of due care may cause serious injury, negligence does not approach the type of abusive conduct the Due Process clause was designed to prevent. *Davidson v. Cannon,* 474 U.S. 344, 347-348 (1986). The guarantees of the Due Process Clause have never been understood to mean that a state must guarantee due care on the part of its officials. *Id.* at 348. Because negligence is not a constitutional claim, *Daniels,* 474 U.S. at 332, (the Fourteenth Amendment of the Constitution does not purport to supplant traditional tort law), and because Plaintiff has pled, at most, a claim for negligence, he has failed to state a claim under the Due Process clause. [FN5]

FN5. Plaintiff also has failed to allege that Defendant acted pursuant to a government policy or custom, which is the necessary third prong of a § 1983 claim.

4. Fourteenth Amendment Equal Protection Claim

Plaintiff claims that in failing to inform him of his 1990 blood test results, prison officials violated the Equal Protection Clause. To maintain a claim for denial of equal protection absent allegations that one is a member of a suspect class, a prisoner must establish that (1) he was treated differently than other prisoners in his circumstances; and (2) that such unequal treatment was the result of intentional and purposeful discrimination. *Brandon v. District of Columbia Bd. of Parole,* 823 F.2d 644, 650 (D.C.Cir.1987). Plaintiff has not alleged that he was treated differently than other prisoners or that Defendant acted intentionally. Plaintiff has simply alleged that prison officials incorrectly handled his blood test results, presumably "singling him out" for inadequate medical treatment. Even if that were true, however, one incident of failing to protect a prisoner, without more, does not constitute an equal protection violation. *Pryor-El,* 892 F.Supp. at 269, (citing *Williams v. Field,* 416 F.2d 483, 486 (9th Cir.1969), *cert. denied,* 397 U.S. 1016 (1970) (prisoner must show a bad faith and oppressive motive in order to claim a violation of the equal protection clause when that claim is based on an isolated failure to protect a prisoner from attack by a fellow inmate)); *see also City of Oklahoma City v. Tuttle,* 471 U.S. 808, 832, *reh'g denied,* (1985) (proof of single incident of unconstitutional activity is not sufficient to impose liability on a municipality under Section 1983 unless incident was caused by a municipal policy). [FN6]

FN6. Similar to Plaintiff's Due Process claim, Plaintiff has failed

to allege that Defendant acted pursuant to a government policy or custom, which is the third prong of a § 1983 claim.

***5** In summary, because Plaintiff has not made a threshold showing, he has failed to state an equal protection claim.

5. Standard of Care Under District of Columbia Code § 24-442.

Plaintiff also alleges that in not informing him of his test results, the government violated the standard of care owed to prisoners under D.C.Code § 24-442. In the absence of diversity, Federal Courts may exercise jurisdiction over a state common law claim only when it is properly joined with a federal statutory or constitutional claim. In cases such as this, however, where the District Court has dismissed all claims over which it has original jurisdiction, the Court may decline to exercise its supplemental jurisdiction pursuant to 28 U.S.C. § 1367(c)(3), which governs the supplemental jurisdiction of District Courts. *Edmondson & Gallagher v. Alban Towers Tenants Assoc.,* 48 F.3d 1260, 1265-66 (D.C.Cir.1995) (whether to dismiss related common law claims once federal claims are dismissed is within the district court's discretion); *see also Mendlow v. University of Washington, et al.,* No. CIV.A. 95-7071, 1996 WL 103751 (D.C.Cir. Jan. 24, 1996). Because Plaintiff has failed to allege a federal claim that would support pendent jurisdiction, this Court declines to exercise supplemental jurisdiction over the common law claim.

Accordingly, for the reasons stated above, the Court finds that Plaintiff's claims must be dismissed.

ORDER

For the reasons discussed in the Court's Memorandum Opinion, it is this 26th day of July, 1996 hereby

ORDERED that Defendants' Motion to Dismiss is granted.
D.D.C.,1996.
Jenkins v. Government of District of Columbia
1996 WL 440551 (D.D.C.)

Motions, Pleadings and Filings **(Back to top)**

- 1:94CV00995 (Docket) (May. 06, 1994)

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LEXSEE 2001 US APP LEXIS 19983

GORDON B. MCDERMOTT, Plaintiff-Appellant, v. NATIONAL SHIPPING COMPANY OF SAUDI ARABIA, Defendant-Appellee.

No. 00-2358

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

18 Fed. Appx. 120; 2001 U.S. App. LEXIS 19983

May 24, 2001, Submitted
September 7, 2001, Decided

NOTICE: [**1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the District of Maryland, at Baltimore. Catherine C. Blake, District Judge. (CA-99-3080-CCB).

DISPOSITION: AFFIRMED.

LexisNexis(R) Headnotes

COUNSEL: John H. West, III, Samuel M. Riley, WEST & MOORE, L.L.C., Baltimore, Maryland, for Appellant.

Frederick L. Kobb, WRIGHT, CONSTABLE & SKEEN, L.L.P., Baltimore, Maryland, for Appellee.

JUDGES: Before WIDENER, WILKINS, and KING, Circuit Judges.

OPINION: [*121]

PER CURIAM:

Gordon B. McDermott appeals the district court orders dismissing his breach of contract and detrimental reliance claims against National Shipping Company of Saudi Arabia ("NSCSA") pursuant to *Fed. R. Civ. P. 12(b)(6)* and denying reconsideration of that order and leave to amend. We affirm.

McDermott accepted the position of Vice President of Marketing/Owner Representative's Office with NSCSA around December 1996. In October 1997, NSCSA terminated McDermott due to company restructuring. McDermott filed a diversity suit in district court claiming NSCSA breached its employment agreement with him. [**2] McDermott also alleged a claim of detrimental reliance.

NSCSA moved to dismiss McDermott's suit pursuant to *Fed. R. Civ. P. 12(b)(6)*, asserting McDermott could not show a definite term of employment and under Maryland's presumption of at-will employment, could not state a claim upon which relief could be granted. The district court granted NSCSA's motion. McDermott filed a motion pursuant to *Fed. R. Civ. P. 15(a)*, *59(e)*, requesting the court to reconsider its order and requesting leave to file an amended complaint. The district court denied the motion and McDermott appealed.

This Court reviews de novo a district court's Rule 12(b)(6) dismissal for failure to state a claim upon which relief may be granted. See *Flood v. New Hanover County, 125 F.3d 249, 251 (4th Cir. 1997)*. We accept the complainant's well-pleaded allegations as true and view the facts in the light most favorable to the non-moving party. See *Mylan Labs., Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993)*. Under Maryland's presumption of employment at-will, with narrow exceptions not claimed by McDermott to be applicable, an employment contract of indefinite duration can be legally [**3] terminated at the pleasure of either party at any time for any reason. See *Adler v. American Standard Corp., 291 Md. 31, 432 A.2d 464, 467 (Md. 1981)*. When an employment contract "does not expressly specify a particular time or event terminating the employment relationship" it is considered at-will. *Shapiro v. Massengill, 105 Md. App. 743, 661 A.2d 202, 208 (Md. Ct. Spec. App. 1995)*.

[*122]

McDermott's complaint stated that "through its December 6, 1996 correspondence and other communications, NSCSA guaranteed McDermott's employment for a period of not less than five (5) years." We find neither the December 6, 1996 correspondence nor any other allegation in McDermott's pleadings set out sufficient facts to defeat the presumption of at-will employment.

To state a claim for detrimental reliance under Maryland law, McDermott must show:

> (1) a clear and definite promise; (2) where the promisor has a reasonable expectation that the offer will induce action or forbearance on the part of the promisee; (3) which does induce actual and reasonable action or forbearance by the promisee; and (4) causes a detriment which can only be avoided by the enforcement [**4] of the promise.

Pavel Enters. Inc. v. A.S. Johnson, Inc., 342 Md. 143, 674 A.2d 521, 532 (Md. 1996).

Assuming without deciding that detrimental reliance of some unusual or extraordinary character can constitute an exception to the at-will employment doctrine, we find McDermott's claims unpersuasive. At bottom, McDermott's assertions of detrimental reliance are garden variety claims that, if recognized as adequate exceptions to defeat application of the doctrine, would virtually swallow the rule. Rather, it is clear that because McDermott's employment was at-will, he could not reasonably rely on the employer's statement of his intent to employ him. See *McNierney v. McGraw-Hill, Inc., 919 F. Supp. 853, 861 (D. Md. 1995).* Therefore, McDermott's claim fails.

The denial of a request for leave to amend a complaint pursuant to *Fed. R. Civ. P. 15(a)* is reviewed for abuse of discretion. See *Edwards v. City of Goldsboro, 178 F.3d 231, 242 (4th Cir. 1999).* Following the dismissal of the action, the ability to amend as of right no longer exists. See *Sachs v. Snider, 631 F.2d 350, 351 (4th Cir. 1980)* (per curiam). We find [**5] the district court did not abuse its discretion in denying McDermott's motion to reconsider and to amend.

We therefore affirm the district court's dismissal of McDermott's action and denial of his motion for reconsideration and to amend. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

LEXSEE 411 US 792

McDONNELL DOUGLAS CORP. v. GREEN

No. 72-490

SUPREME COURT OF THE UNITED STATES

411 U.S. 792; 93 S. Ct. 1817; 36 L. Ed. 2d 668; 1973 U.S. LEXIS 154; 5 Fair Empl. Prac. Cas. (BNA) 965; 5 Empl. Prac. Dec. (CCH) P8607

March 28, 1973, Argued
May 14, 1973, Decided

PRIOR HISTORY:

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

DISPOSITION:

463 F.2d 337, vacated and remanded.

LexisNexis(R) Headnotes

SYLLABUS:

Respondent, a black civil rights activist, engaged in disruptive and illegal activity against petitioner as part of his protest that his discharge as an employee of petitioner's and the firm's general hiring practices were racially motivated. When petitioner, who subsequently advertised for qualified personnel, rejected respondent's re-employment application on the ground of the illegal conduct, respondent filed a complaint with the Equal Employment Opportunity Commission (EEOC) charging violation of Title VII of the Civil Rights Act of 1964. The EEOC found that there was reasonable cause to believe that petitioner's rejection of respondent violated § 704 (a) of the Act, which forbids discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory employment conditions, but made no finding on respondent's allegation that petitioner had also violated § 703 (a)(1), which prohibits discrimination in any employment decision. Following unsuccessful EEOC conciliation efforts, respondent brought suit in the District Court, which ruled that respondent's illegal activity was not protected by § 704 (a) and dismissed the § 703 (a)(1) claim because the EEOC had made no finding with respect thereto. The Court of Appeals affirmed the § 704 (a) ruling, but reversed with respect to § 703 (a)(1), holding that an EEOC determination of reasonable cause was not a jurisdictional prerequisite to claiming a violation of that provision in federal court. *Held*:

1. A complainant's right to bring suit under the Civil Rights Act of 1964 is not confined to charges as to which the EEOC has made a reasonable-cause finding, and the District Court's error in holding to the contrary was not harmless since the issues raised with respect to § 703 (a)(1) were not identical to those with respect to § 704 (a) and the dismissal of the former charge may have prejudiced respondent's efforts at trial. Pp. 798-800.

2. In a private, non-class-action complaint under Title VII charging racial employment discrimination, the complainant has the burden of establishing a prima facie case, which he can satisfy by showing that (i) he belongs to a racial minority; (ii) he applied and was qualified for a job the employer was trying to fill; (iii) though qualified, he was rejected; and (iv) thereafter the employer continued to seek applicants with complainant's qualifications. P. 802.

3. Here, the Court of Appeals, though correctly holding that respondent proved a prima facie case, erred in holding that petitioner had not discharged its burden of proof in rebuttal by showing that its stated reason for the rehiring refusal was based on respondent's illegal activity. But on remand respondent must be afforded a fair opportunity of proving that petitioner's stated reason was just a pretext for a racially discriminatory decision, such as by showing that whites engaging in similar illegal activity were retained or hired by petitioner. Other evidence that may be relevant, depending on the circumstances, could include facts that petitioner had discriminated against respondent when he was an employee or followed a discriminatory policy toward minority employees. Pp. 802-805.

COUNSEL:

Veryl L. Riddle argued the cause for petitioner. With him on the briefs were R. H. McRoberts and Thomas C. Walsh.

Louis Gilden argued the cause for respondent. With him on the brief were Jack Greenberg, James M. Nabrit III, William L. Robinson, and Albert Rosenthal. *

* Milton A. Smith and Lawrence M. Cohen filed a brief for the Chamber of Commerce of the United States as amicus curiae urging reversal.

Solicitor General Griswold, Assistant Attorney General Pottinger, Deputy Solicitor General Wallace, Keith A. Jones, David L. Rose, Julia P. Cooper, and Beatrice Rosenberg filed a brief for the United States as amicus curiae urging affirmance.

JUDGES:

Powell, J., delivered the opinion for a unanimous Court.

OPINIONBY:

POWELL

OPINION:

[*793] [***673] [**1820] MR. JUSTICE POWELL delivered the opinion of the Court.

The case before us raises significant questions as to the proper order and nature of proof in actions under Title

[*794] VII of the Civil Rights Act of 1964, 78 Stat. 253, *42 U. S. C. § 2000c et seq.*

Petitioner, McDonnell Douglas Corp., is an aerospace and aircraft manufacturer headquartered in St. Louis, Missouri, where it employs over 30,000 people. Respondent, a black citizen of St. Louis, worked for petitioner as a mechanic and laboratory technician from 1956 until August 28, 1964 n1 when he was laid off in the course of a general reduction in petitioner's work force.

n1 His employment during these years was continuous except for 21 months of service in the military.

Respondent, a long-time activist in the civil rights movement, protested vigorously that his discharge and the general hiring practices of petitioner were racially motivated. n2 As part of this protest, respondent and other members of the Congress on Racial Equality illegally stalled their cars on the main roads leading to petitioner's plant for the purpose of blocking access to it at the time of the morning shift change. The District Judge described the plan for, and respondent's participation in, the "stall-in" as follows:

"Five teams, each consisting of four cars would 'tie up' five main access roads into McDonnell at the time of the morning rush hour. The drivers of the cars were instructed to line up next to each other completely blocking the intersections or roads. The drivers were also instructed to stop their cars, turn off the engines, pull the emergency brake, raise all windows, lock the doors, and remain in their cars until the police arrived. The plan was to have the cars remain in position for one hour.

[*795] "Acting under the 'stall in' plan, plaintiff [respondent in the present action] drove his car onto Brown Road, a McDonnell access road, at approximately 7:00 a. m., at the start of the morning rush hour. Plaintiff was aware of the traffic problems that would result. He stopped his car with the intent to block traffic. The police [**1821] arrived shortly and requested plaintiff to move his car. He refused to move his car voluntarily. Plaintiff's car was towed away by the police, and he was arrested for obstructing traffic. Plaintiff pleaded guilty to the charge of [***674] obstructing traffic and was fined." *318 F.Supp. 846, 849.*

n2 The Court of Appeals noted that respondent then "filed formal complaints of discrimination with the President's Commission on Civil Rights, the Justice Department, the Department of the Navy, the Defense Department, and the Missouri Commission on Human Rights." *463 F.2d 337, 339 (1972).*

On July 2, 1965, a "lock-in" took place wherein a chain and padlock were placed on the front door of a building to prevent the occupants, certain of petitioner's employees, from leaving. Though respondent apparently knew beforehand of the "lock-in," the full extent of his involvement remains uncertain. n3

n3 The "lock-in" occurred during a picketing demonstration by ACTION, a civil rights organization, at the entrance to a downtown office building which housed a part of petitioner's offices and in which certain of petitioner's employees were working at the time. A chain and padlock were placed on the front door of the building to prevent ingress and egress. Although respondent acknowledges that he was chairman of ACTION at the time, that the demonstration was planned and staged by his group, that he participated in and indeed was in charge of the picket line in front of the building, that he was told in advance by a member of ACTION "that he was planning to chain the front door," and that he "approved of" chaining the door, there is no evidence that respondent personally took part in the actual "lock-in," and he was not arrested. App. 132-133.

The Court of Appeals majority, however, found that the record did "not support the trial court's conclusion that Green 'actively cooperated' in chaining the doors of the downtown St. Louis building during the 'lock-in' demonstration." *463 F.2d, at 341.* See also concurring opinion of Judge Lay. *Id., at 345.* Judge Johnsen, in dissent, agreed with the District Court that the "chaining and padlocking [were] carried out as planned, [and that] Green had in fact given it . . . approval and authorization." *Id., at 348.*

In view of respondent's admitted participation in the unlawful "stall-in," we find it unnecessary to resolve the contradictory contentions surrounding this "lock-in."

[*796] Some three weeks following the "lock-in," on July 25, 1965, petitioner publicly advertised for qualified mechanics, respondent's trade, and respondent promptly applied for re-employment. Petitioner turned down respondent, basing its rejection on respondent's participation in the "stall-in" and "lock-in." Shortly thereafter, respondent filed a formal complaint with the Equal Employment Opportunity Commission, claiming that petitioner had refused to rehire him because of his race and persistent involvement in the civil rights movement, in violation of §§ 703 (a)(1) and 704 (a) of the Civil Rights Act of 1964, *42 U. S. C. §§ 2000e-2* (a)(1) and 2000e-3 (a). n4 The former section generally prohibits racial discrimination in any employment decision while the latter forbids discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory conditions of employment.

n4 Section 703 (a)(1) of the Civil Rights Act of 1964, *42 U. S. C. § 2000e-2* (a)(1), in pertinent part provides:

"It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ."

Section 704 (a) of the Civil Rights Act of 1964, *42 U. S. C. § 2000e-3* (a), in pertinent part provides:

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . ."

[*797] The Commission made no finding on respondent's allegation of racial bias under § 703 (a)(1), but it did find reasonable cause to believe petitioner [***675] had violated § 704 (a) by refusing to rehire respondent because of his civil rights activity. After the Commission unsuccessfully attempted to conciliate the dispute, it advised respondent in March 1968, of his right to institute a civil action in federal court within 30 days.

On April 15, 1968, respondent brought the present action, claiming initially a violation of § 704 (a) and, in an amended [**1822] complaint, a violation of § 703 (a)(1) as well. n5 The District Court dismissed the latter claim of racial discrimination in petitioner's hiring procedures on the ground that the Commission had failed to make a determination of reasonable cause to believe that a violation of that section had been committed. The District Court also found that petitioner's refusal to rehire respondent was based solely on his participation in the illegal demonstrations and not on his legitimate civil rights activities. The court concluded that nothing in Title VII or § 704 protected "such activity as employed by the plaintiff in the 'stall in' and 'lock in' demonstrations." *318 F.Supp., at 850.*

n5 Respondent also contested the legality of his 1964 discharge by petitioner, but both courts held this claim barred by the statute of limitations. Respondent does not challenge those rulings here.

On appeal, the Eighth Circuit affirmed that unlawful protests were not protected activities under § 704 (a), n6 but reversed the dismissal of respondent's § 703 (a)(1) claim relating to racially discriminatory hiring practices, holding that a prior Commission determination of reasonable cause was not a jurisdictional prerequisite to raising a claim under that section in federal court. The court

[*798] ordered the case remanded for trial of respondent's claim under § 703 (a)(1).

n6 Respondent has not sought review of this issue.

In remanding, the Court of Appeals attempted to set forth standards to govern the consideration of respondent's claim. The majority noted that respondent had established a prima facie case of racial discrimination; that petitioner's refusal to rehire respondent rested on "subjective" criteria which carried little weight in rebutting charges of discrimination; that, though respondent's participation in the unlawful demonstrations might indicate a lack of a responsible attitude toward performing work for that employer, respondent should be given the opportunity to demonstrate that petitioner's reasons for refusing to rehire him were mere pretext. n7 In order to clarify the standards governing the disposition of an action challenging employment discrimination, we granted certiorari, *409 U.S. 1036 (1972).*

n7 All references here are to Part V of the revised opinion of the Court of *Appeals, 463 F.2d, at 352,* which superseded Part V of the court's initial opinion with respect to the order and nature of proof.

I

[***HR1A] [***HR2] We agree with the Court of Appeals that absence of a Commission finding of reasonable cause cannot bar suit under an appropriate section of Title VII and that the District Judge erred in dismissing respondent's claim of racial discrimination under § 703 (a)(1). Respondent satisfied the jurisdictional prerequisites to a federal action (i) by filing timely charges of employment discrimination with the Commission and (ii) by receiving and acting upon the Commission's statutory [***676] notice of the right to sue, *42 U. S. C. §§ 2000e-5* (a) and 2000e-5 (e). The Act does not restrict a complainant's right to sue to those charges as to which the Commission has made findings of reasonable cause, and we will not engraft on the statute a requirement which may inhibit the review of

[*799] claims of employment discrimination in the federal courts. The Commission itself does not consider the absence of a "reasonable cause" determination as providing employer immunity from similar charges in a federal court, *29 CFR § 1601.30*, and the courts of appeal have held that, in view of the large volume of complaints before the Commission and the nonadversary character of many of its proceedings, "court actions under Title VII are de novo proceedings [**1823] and . . . a Commission 'no reasonable cause' finding does not bar a lawsuit in the case." *Robinson v. Lorillard Corp., 444 F.2d 791, 800 (CA4 1971); Beverly v. Lone Star Lead Construction Corp., 437 F.2d 1136 (CA5 1971); Flowers v. Local 6, Laborers International Union of North America, 431 F.2d 205 (CA7 1970); Fekete v. U.S. Steel Corp., 424 F.2d 331 (CA3 1970).*

[***HR3] Petitioner argues, as it did below, that respondent sustained no prejudice from the trial court's erroneous ruling because in fact the issue of racial discrimination in the refusal to re-employ "was tried thoroughly" in a trial lasting four days with "at least 80%" of the questions relating to the issue of "race." n8 Petitioner, therefore, requests that the judgment below be vacated and the cause remanded with instructions that the judgment of the District Court be affirmed. n9 We cannot agree that the dismissal of respondent's § 703 (a)(1) claim was harmless error. It is not clear that the District Court's findings as to respondent's § 704 (a) contentions involved the identical issues raised by his claim under § 703 (a)(1). The former section relates solely to discrimination against an applicant or employee on account of his participation in legitimate civil rights activities or protests, while the latter section deals with the broader and centrally

[*800] important question under the Act of whether, for any reason, a racially discriminatory employment decision has been made. Moreover, respondent should have been accorded the right to prepare his case and plan the strategy of trial with the knowledge that the § 703 (a)(1) cause of action was properly before the District Court. n10 Accordingly, we remand the case for trial of respondent's claim of racial discrimination consistent with the views set forth below.

n8 Tr. of Oral Arg. 11.

n9 Brief for Petitioner 40.

n10 The trial court did not discuss respondent's § 703 (a)(1) claim in its opinion and denied requests for discovery of statistical materials which may have been relevant to that claim.

II

[***HR4] [***HR5] [***HR6] The critical issue before us concerns the order and allocation of proof in a private, non-class action challenging employment discrimination. The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens. *Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971);* [***677] *Castro v. Beecher, 459 F.2d 725 (CA1 1972); Chance v. Board of Examiners, 458 F.2d 1167 (CA2 1972); Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (ED Va. 1968).* As noted in *Griggs, supra:*

"Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.

[*801] What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id., at 430-431.*

[***HR7] There are societal as well as personal interests on both sides of this equation. The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of [**1824] such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.

In this case respondent, the complainant below, charges that he was denied employment "because of his involvement in civil rights activities" and "because of his race and color." n11 Petitioner denied discrimination of any kind, asserting that its failure to re-employ respondent was based upon and justified by his participation in the unlawful conduct against it. Thus, the issue at the trial on remand is framed by those opposing factual contentions. The two opinions of the Court of Appeals and the several opinions of the three judges of that court attempted, with a notable lack of harmony, to state the applicable rules as to burden of proof and how this shifts upon the making of a prima facie case. n12 We now address this problem.

n11 The respondent initially charged petitioner in his complaint filed April 15, 1968, with discrimination because of his "involvement in civil rights activities." App. 8. In his amended complaint, filed March 20, 1969, plaintiff broadened his charge to include denial of employment because of race in violation of § 703 (a)(1). App. 27.

n12 See original opinion of the majority of the panel which heard the case, *463 F.2d, at 338;* the concurring opinion of Judge Lay, *id., at 344;* the first opinion of Judge Johnsen, dissenting in part, *id., at 346;* the revised opinion of the majority, *id., at 352;* and the supplemental dissent of Judge Johnsen, *id., at 353.* A petition for rehearing en banc was denied by an evenly divided Court of Appeals.

[*802]

[***HR8] [***HR9A] [***HR10] The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. n13 In the instant case, we [***678] agree with the Court of Appeals that respondent proved a prima facie case. *463 F.2d 337, 353.* Petitioner sought mechanics, respondent's trade, and continued to do so after respondent's rejection. Petitioner, moreover, does not dispute respondent's qualifications n14 and acknowledges that his past work performance in petitioner's employ was "satisfactory." n15

n13 The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.

n14 We note that the issue of what may properly be used to test qualifications for employment is not present in this case. Where employers have instituted employment tests and qualifications with an exclusionary effect on minority applicants, such requirements must be "shown to bear a demonstrable relationship to successful performance of the jobs" for which they were used, *Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Castro v. Beecher, 459 F.2d 725 (CA1 1972); Chance v. Board of Examiners, 458 F.2d 1167 (CA2 1972).*

n15 Tr. of Oral Arg. 3; *463 F.2d, at 353.*

The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. We need not attempt in the instant case to detail every matter which fairly could be

[*803] recognized as a reasonable basis for a refusal to hire. Here petitioner has assigned respondent's participation in unlawful conduct against it as the cause for his rejection. We think that this suffices to discharge petitioner's burden of proof at this stage and to meet respondent's prima facie case of discrimination.

[***HR12A] [***HR13] The Court of Appeals intimated, however, that petitioner's stated reason for refusing to rehire respondent was a "subjective" rather than objective criterion which "carr[ies] little weight in rebutting charges of discrimination," *463 F.2d, at 352.* This was among the statements which caused the dissenting judge [**1825] to read the opinion as taking "the position that such unlawful acts as Green committed against McDonnell would not legally entitle McDonnell to refuse to hire him, even though no racial motivation was involved . . . ." *Id., at 355.* Regardless of whether this was the intended import of the opinion, we think the court below seriously underestimated the rebuttal weight to which petitioner's reasons were entitled. Respondent admittedly had taken part in a carefully planned "stall-in," designed to tie up access to and egress from petitioner's plant at a peak traffic hour. n16 Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it. n17 In upholding, under the National Labor Relations Act, the discharge of employees who had seized and forcibly retained

[*804] an employer's factory buildings in an illegal sit-down strike, the Court noted pertinently:

"We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct, — to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property . . . . Apart [***679] from the question of the constitutional validity of an enactment of that sort, it is enough to say that such a legislative intention should be found in some definite and unmistakable expression." *NLRB v. Fansteel Corp., 306 U.S. 240, 255 (1939).*

n16 The trial judge noted that no personal injury or property damage resulted from the "stall-in" due "solely to the fact that law enforcement officials had obtained notice in advance of plaintiff's [here respondent's] demonstration and were at the scene to remove plaintiff's car from the highway." *318 F.Supp. 846, 851.*

n17 The unlawful activity in this case was directed specifically against petitioner. We need not consider or decide here whether, or under what circumstances, unlawful activity not directed against the particular employer may be a legitimate justification for refusing to hire.

[***HR14] [***HR15A] [***HR16] Petitioner's reason for rejection thus suffices to meet the prima facie case, but the inquiry must not end here. While Title VII does not, without more, compel rehiring of respondent, neither does it permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by § 703 (a)(1). On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the "stall-in" were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.

Other evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and

[*805] practice with respect to minority employment. n18 On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks. *Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245* [**1826] *(CA10 1970);* Blumrosen, Strangers in Paradise: *Griggs* v. *Duke Power Co.*, and the Concept of Employment Discrimination, *71 Mich. L. Rev. 59, 91-94 (1972).* n19 In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.

n18 We are aware that some of the above factors were, indeed, considered by the District Judge in finding under § 704 (a), that "defendant's [here petitioner's] reasons for refusing to rehire the plaintiff were motivated solely and simply by the plaintiff's participation in the 'stall in' and 'lock in' demonstrations." *318 F.Supp., at 850.* We do not intimate that this finding must be overturned after consideration on remand of respondent's § 703 (a)(1) claim. We do, however, insist that respondent under § 703 (a)(1) must be given a full and fair opportunity to demonstrate by competent evidence that whatever the stated reasons for his rejection, the decision was in reality racially premised.

n19 The District Court may, for example, determine, after reasonable discovery that "the [racial] composition of defendant's labor force is itself reflective of restrictive or exclusionary practices." See Blumrosen, *supra*, at 92. We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire. See generally *United States v. Bethlehem Steel Corp., 312 F.Supp. 977, 992 (WDNY 1970),* order modified, *446 F.2d 652 (CA2 1971).* Blumrosen, *supra*, n. 19, at 93.

[***HR17] [***HR18A] The court below appeared to rely upon *Griggs v. Duke Power Co., supra,* in which the Court stated: "If an employment practice which operates to exclude Negroes cannot

[*806] be shown to be related to job performance, the practice is prohibited. " *401 U.S., at 431.* [***680] n20 But *Griggs* differs from the instant case in important respects. It dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions. *Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives. *Id., at 430.* Respondent, however, appears in different clothing. He had engaged in a seriously disruptive act against the very one from whom he now seeks employment. And petitioner does not seek his exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification of all those with any past record of unlawful behavior, however remote, insubstantial, or unrelated to applicant's personal qualifications as an employee. Petitioner assertedly rejected respondent for unlawful conduct against it and, in the absence of proof of pretext or discriminatory application of such a reason, this cannot be thought the kind of "artificial, arbitrary, and unnecessary barriers to employment" which the Court found to be the intention of Congress to remove. *Id., at 431.* n21

n20 See *463 F.2d, at 352.*

[***HR18B]

n21 It is, of course, a predictive evaluation, resistant to empirical proof, whether "an applicant's past participation in unlawful conduct directed at his prospective employer might indicate the applicant's lack of a responsible attitude toward performing work for that employer." *463 F.2d, at 353.* But in this case, given the seriousness and harmful potential of respondent's participation in the "stall-in" and the accompanying inconvenience to other employees, it cannot be said that petitioner's refusal to employ lacked a rational and neutral business justification. As the Court has noted elsewhere:

"Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust." *Garner v. Los Angeles Board, 341 U.S. 716, 720 (1951).*

[*807] III

[***HR1B] [***HR9B] [***HR12B] [***HR15B] [***HR19] In sum, respondent should have been allowed to pursue his claim under § 703 (a)(1). If the evidence on retrial is substantially in accord with that before us in this case, we think that respondent carried his burden of establishing a prima facie case of racial discrimination and that petitioner successfully rebutted that case. But this does not end the matter. On retrial, respondent must be afforded a fair opportunity to demonstrate [**1827] that petitioner's assigned reason for refusing to re-employ was a pretext or discriminatory in its application. If the District Judge so finds, he must order a prompt and appropriate remedy. In the absence of such a finding, petitioner's refusal to rehire must stand.

The judgment is vacated and the cause is hereby remanded to the District Court for further proceedings consistent with this opinion.

So ordered.

REFERENCES: Return To Full Text Opinion

15 Am Jur 2d, Civil Rights 58.3

5 Am Jur Pl n Pr Forms (Rev ed), Civil Rights, Forms 61-63; 16 Am Jur Pl & Pr Forms (Rev ed), Labor and Labor Relations, Forms 323-337

US L Ed Digest, Civil Rights 7.5, 12.5; Evidence 90, 383, 787, 904.3

ALR Digests, Civil Rights 1

L Ed Index to Anno, Labor and Employment

ALR Quick Index, Discrimination; Fair Employment Practices

Federal Quick Index, Civil Rights; Fair Employment Practices

Annotation References:

Racial discrimination in labor and employment. 28 L Ed 2d 928.

LEXSEE 674 A2D 521

PAVEL ENTERPRISES, INC. v. A. S. JOHNSON COMPANY, INC.

No. 62, September Term, 1995

COURT OF APPEALS OF MARYLAND

342 Md. 143; 674 A.2d 521; 1996 Md. LEXIS 37

April 10, 1996, Filed

SUBSEQUENT HISTORY: [***1]

As Corrected May 6, 1996.

PRIOR HISTORY:

Appeal from the Circuit Court for Prince George's County pursuant to certiorari to the Court of Special Appeals, Arthur M. Ahalt, JUDGE.

DISPOSITION:

JUDGMENT AFFIRMED, WITH COSTS.

LexisNexis(R) Headnotes

COUNSEL:

ARGUED BY Douglas L. Patin (Spriggs & Hollingsworth, on brief) of Washington, DC FOR APPELLANT.

ARGUED BY Tarrant H. Lomax (Rhodes, Dunbar & Lomax, Chartered, on brief) of Washington, DC FOR APPELLEE.

JUDGES: ARGUED BEFORE Murphy, C.J.; Eldridge, Rodowsky, Chasanow, Karwacki, Bell, and Raker, JJ.

OPINIONBY: Karwacki

OPINION:

[*146] [**523] Karwacki, J.

In this case we are invited to adapt the "modern" contractual theory of detrimental reliance, n1 or promissory estoppel, to the relationship between general contractors and their subcontractors. Although the theory of detrimental reliance is available to general contractors, it is not applicable to the facts of this case. For that reason, and because there was no traditional bilateral contract formed, we shall affirm the trial court.

n1 We prefer to use the phrase detrimental reliance, rather than the traditional nomenclature of "promissory estoppel," because we believe it more clearly expresses the concept intended. Moreover, we hope that this will alleviate the confusion which until now has permitted practitioners to confuse promissory estoppel with its distant cousin, equitable estoppel. *See* Note, *The "Firm offer" Problem in Construction Bids and the Need for Promissory Estoppel, 10 WM & MARY L. Rev. 212, 214 n.17 (1968)* [hereinafter, *"The Firm Offer Problem"*].

[***2]

I

The National Institutes of Health [hereinafter, "NIH"], solicited bids for a renovation project on Building 30 of its

Bethesda, Maryland campus. The proposed work entailed some demolition work, but the major component of the job

[*147] was mechanical, including heating, ventilation and air conditioning ["HVAC"] . Pavel Enterprises Incorporated [hereinafter, "PEI"], a general contractor from Vienna, Virginia and appellant in this action, prepared a bid for the NIH work. In preparing its bid, PEI solicited sub-bids from various mechanical subcontractors. The A. S. Johnson Company [hereinafter, "Johnson"], a mechanical subcontractor located in Clinton, Maryland and the appellee here, responded with a written scope of work proposal on July 27, 1993. n2 On the morning of August 5, 1993, the day NIH opened the general contractors' bids, Johnson verbally submitted a quote of $898,000 for the HVAC component. n3 Neither party disputes that PEI used Johnson's sub-bid in computing its own bid. PEI submitted a bid of $1,585,000 for the entire project.

n2 The scope of work proposal listed all work that Johnson proposed to perform, but omitted the price term. This is a standard practice in the construction industry. The subcontractor's bid price is then filled in immediately before the general contractor submits the general bid to the letting party.

[***3]

n3 PEI alleged at trial that Johnson's bid, as well as the bids of the other potential mechanical subcontractors contained a fixed cost of $355,000 for a sub-sub-contract to "Landis and Gear Powers" [hereinafter, "Powers"]. Powers was the sole source supplier of the electric controls for the project.

General contractors' bids were opened on the afternoon of August 5, 1993. PEI's bid was the *second* lowest bid. The government subsequently disqualified the apparent low bidder, n4 however, and in mid-August, NIH notified PEI that its bid would be accepted.

n4 The project at NIH was part of a set-aside program for small business. The apparent low bidder, J. J. Kirlin, Inc. was disqualified because it was not a small business.

With the knowledge that PEI was the lowest responsive bidder, Thomas F. Pavel, president of PEI, visited the offices of A. S. Johnson on August 26, 1993, and met with James Kick, Johnson's chief [***4] estimator, to discuss Johnson's proposed role in the work. Pavel testified at trial to the purpose of the meeting:

[*148] "I met with Mr. Kick. And the reason for me going to their office was to look at their offices, to see their facility, to basically sit down and talk with them, as I had not done, and my company had not performed business with them on a direct relationship, but we had heard of their reputation. I wanted to go out and see where their facility was, see where they were located, and basically just sit down and talk to [**524] them. Because if we were going to use them on a project, I wanted to know who I was dealing with."

Pavel also asked if Johnson would object to PEI subcontracting directly with Powers for electric controls, rather than the arrangement originally envisioned in which Powers would be Johnson's subcontractor. n5 Johnson did not object.

n5 Pavel testified at trial that restructuring the arrangement in this manner would reduce the amount PEI needed to bond and thus reduce the price of the bond.

[***5]

Following that meeting, PEI sent a fax to all of the mechanical subcontractors from whom it had received sub-bids on the NIH job. The text of that fax is reproduced:

Pavel Enterprises, Inc.

TO: PROSPECTIVE MECHANICAL SUBCONTRACTORS FROM: ESTIMATING DEPARTMENT REFERENCE: NIH, BLDG 30 RENOVATION

We herewith respectfully request that you review your bid on the above referenced project that was bid on 8/05/93. PEI has been notified that we will be awarded the project as J.J. Kirlin, Inc. [the original low bidder] has been found to be nonresponsive on the solicitation. We anticipate award on or around the first of September and therefor request that you supply the following information.

1. Please break out your cost for the "POWERS" supplied control work as we will be subcontracting directly to "POWERS".

[*149] 2. Please resubmit your quote deleting the above referenced item.

We ask this in an effort to allow all prospective bidders to compete on an even playing field.

Should you have any questions, please call us immediately as time is of the essence.

On August 30, 1993, PEI informed NIH that Johnson was to be the mechanical subcontractor on the [***6] job. On September 1, 1993, PEI mailed and faxed a letter to Johnson formally accepting Johnson's bid. That letter read:

Pavel Enterprises, Inc.

September 1, 1993

Mr. James H. Kick, Estimating Mngr. A.S. Johnson Company 8042 Old Alexandria Ferry Road Clinton, Maryland 20735

Re: NIH Bldg 30 HVAC Modifications IFB # 263-93-B (CM) - 0422

Subject: Letter of Intent to award Subcontract

Dear Mr. Kick;

We herewith respectfully inform your office of our intent to award a subcontract for the above referenced project per your quote received on 8/05/93 in the amount of $898,000.00. This subcontract will be forwarded upon receipt of our contract from the NIH, which we expect any day. A preconstruction meeting is currently scheduled at the NIH on 9/08/93 at 10 AM which we have been requested that your firm attend.

As discussed with you, a meeting was held between NIH and PEI wherein PEI confirmed our bid to the government, and designated your firm as our HVAC Mechanical subcontractor. This action was taken after several telephonic and face to face discussions with you regarding the above referenced bid submitted by your firm.

[*150] We look forward to working [***7] with your firm on this contract and hope that this will lead to a long and mutually beneficial relationship.

Sincerely,

/s/ Thomas F. Pavel, President

Upon receipt of PEI's fax of September 1, James Kick called and informed PEI that Johnson's bid contained an error, and as a result the price was too low. According to Kick, Johnson had discovered the mistake earlier, but because Johnson believed that PEI had not been awarded the contract, they did not feel compelled to correct the error. Kick sought to withdraw Johnson's bid, both [**525] over the telephone and by a letter dated September 2, 1993:

A. S. Johnson Co.

September 2, 1993

PEI Construction 780 West Maples Avenue, Suite 101 Vienna, Virginia 22180

Attention: Thomas Pavel, President

Reference: NIH Building 30 HVAC Modifications

Dear Mr. Pavel,

We respectfully inform you of our intention to withdraw our proposal for the above referenced project due to an error in our bid.

As discussed in our telephone conversation and face to face meeting, the management of A. S. Johnson Company was reviewing this proposal, upon which we were to confirm our pricing to you.

Please contact [***8] Mr. Harry Kick, General Manager at [telephone number deleted] for any questions you may have.

Very truly yours,

/s/ James H. Kick Estimating Manager

[*151] PEI responded to both the September 1 phone call, and the September 2 letter, expressing its refusal to permit Johnson to withdraw.

On September 28, 1993, NIH formally awarded the construction contract to PEI. PEI found a substitute subcontractor to do the mechanical work, but at a cost of $930,000. n6 PEI brought suit against Johnson in the Circuit Court for Prince George's County to recover the $32,000 difference between Johnson's bid and the cost of the substitute mechanical subcontractor.

n6 The record indicates that the substitute mechanical subcontractor used "Powers" as a sub-subcontractor and did not "break out" the "Powers" component to be directly subcontracted by PEI.

The case was heard by the trial court without the aid of a jury. The trial court made several findings of fact, which we summarize:

1. PEI relied upon Johnson's [***9] sub-bid in making its bid for the entire project;

2. The fact that PEI was not the low bidder, but was awarded the project only after the apparent low bidder was disqualified, takes this case out of the ordinary;

3. Prior to NIH awarding PEI the contract on September 28, Johnson, on September 2, withdrew its bid; and

4. PEI's letter to all potential mechanical subcontractors, dated August 26, 1993, indicates that there was no definite agreement between PEI and Johnson, and that PEI was not relying upon Johnson's bid.

The trial court analyzed the case under both a traditional contract theory and under a detrimental reliance theory. PEI was unable to satisfy the trial judge that under either theory that a contractual relationship had been formed.

PEI appealed to the Court of Special Appeals, raising both traditional offer and acceptance theory, and "promissory estoppel." Before our intermediate appellate court considered the case, we issued a writ of certiorari on our own motion.

[*152] II

The relationships involved in construction contracts have long posed a unique problem in the law of contracts. A brief overview of the mechanics of the construction bid process, [***10] as well as our legal system's attempts to regulate the process, is in order.

A. CONSTRUCTION BIDDING.

Our description of the bid process in *Maryland Supreme Corp. v. Blake Co., 279 Md. 531, 369 A.2d 1017 (1977)* is still accurate:

> "In such a building project there are basically three parties involved: the letting party, who calls for bids on its job; the general contractor, who makes a bid on the whole project; and the subcontractors, who bid only on that portion of the whole job which involves the field of its specialty. [**526] The usual procedure is that when a project is announced, a subcontractor, on his own initiative or at the general contractor's request, prepares an estimate and submits a bid to one or more of the general contractors interested in the project. The general contractor evaluates the bids made by the subcontractors in each field and uses them to compute its total bid to the letting party. After receiving bids from general contractors, the letting party ordinarily awards the contract to the lowest reputable bidder."

Id. at 533-34, 369 A.2d at 1020-21 (citing *The Firm Offer problem*).

B. THE CONSTRUCTION BIDDING CASES - AN HISTORICAL [*11] OVERVIEW.**

The problem the construction bidding process poses is the determination of the precise points on the timeline that the various parties become bound to each other. The early landmark case was *James Baird Co. v. Gimbel Bros., Inc., 64 F.2d 344 (2d Cir. 1933)*. The plaintiff, James Baird Co., ["Baird"] was a general contractor from Washington, D.C., bidding to construct a government building in Harrisburg, Pennsylvania.

[*153] Gimbel Bros., Inc., ["Gimbel"], the famous New York department store, sent its bid to supply linoleum to a number of bidding general contractors on December 24, and Baird received Gimbel's bid on December 28. Gimbel realized its bid was based on an incorrect computation and notified Baird of its withdrawal on December 28. The letting authority awarded Baird the job on December 30. Baird formally accepted the Gimbel bid on January 2. When Gimbel refused to perform, Baird sued for the additional cost of a substitute linoleum supplier. The Second Circuit Court of Appeals held that Gimbel's initial bid was an offer to contract and, under traditional contract law, remained open only until accepted or withdrawn. Because the offer was withdrawn before it [***12] was accepted there was no contract. Judge Learned Hand, speaking for the court, also rejected two alternative theories of the case: unilateral contract and promissory estoppel. He held that Gimbel's bid was not an offer of a unilateral contract n7 that Baird could accept by performing, i.e., submitting the bid as part of the general bid; and second, he held that the theory of promissory estoppel was limited to cases involving charitable pledges.

n7 A unilateral contract is a contract which is accepted, not by traditional acceptance, but by performance. 2 *Williston on contracts* § 6:2 (4th ed.).

Judge Hand's opinion was widely criticized, *see* Note, *Contracts-Promissory Estoppel, 20 VA. L. REV. 214 (1933)* [hereinafter, "Promissory Estoppel"]; Note, *Contracts-Revocation of Offer Before Acceptance-Promissory Estoppel, 28 ILL. L. REV. 419 (1934),* but also widely influential. The effect of the *James Baird* line of cases, however, is an "obvious injustice without relief of any description." [***13] *Promissory Estoppel*, at 215. The general contractor is bound to the price submitted to the letting party, but the subcontractors are not bound, and are free to withdraw. n8

n8 Note that under the *Baird* line of cases, the general contractor, while bound by his offer to the letting party, is not bound to any specific subcontractor, and is free to "bid shop" prior to awarding the subcontract. Michael L. Closen & Donald G. Weiland, *The Construction Industry Bidding Cases: Application of Traditional Contract, Promissory Estoppel, and Other Theories to the Relations Between General Contractors and Subcontractors, 13 J. MARSHALL L. REV. 565, 583 (1980).* At least one commentator argues that although potentially unfair, this system creates a necessary symmetry between general and subcontractors, in that neither party is bound. Note, *Construction Contracts-The Problem of Offer and Acceptance in the General Contractor-Subcontractor Relationship, 37 U. CINN. L. REV. 798 (1980)* [hereinafter, *"The Problem of Offer and Acceptance"*].

[***14]

As one commentator described it, "If

[*154] the subcontractor revokes his bid before it is accepted by the general, any loss which results is a deduction from the general's profit and conceivably may transform overnight a profitable contract into a losing deal." Franklin M. Schultz, The *Firm Offer Puzzle: A Study of Business Practice in the Construction Industry*, *19 U. CHI. L. REV. 237, 239 (1952).*

The unfairness of this regime to the general contractor was addressed in *Drennan v. Star Paving, 333 P.2d 757, 51 Cal. 2d 409 (1958)* . Like *James Baird*, the *Drennan* [**527] case arose in the context of a bid mistake. n9 Justice Traynor, writing for the Supreme Court of California, relied upon § 90 of the *Restatement (First) of Contracts:*

> "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

[*155] Restatement (First) of Contracts § 90 (1932). n10

n9 Commentators have suggested that the very fact that many of these cases have arisen from bid mistake, an unusual subspecies, rather than from more typical cases, has distorted the legal system's understanding of these cases. Comment, *Bid Shopping and Peddling in the Subcontract Construction Industry, 18 UCLA L. REV. 389, 409 (1970)* [hereinafter, *"Bid Shopping"*].See also note, *Once Around the Flag Pole: Construction Bidding and Contracts at Formation, 39 N.Y.U. L. REV. 816, 818 (1964)* [hereinafter, *"Flag Pole"*] (bid mistake cases generally portray general contractor as victim, but market reality is that subs are usually in weaker negotiating position).
[***15]

n10 This section of the Restatement has been supplanted by the *Restatement (Second) of Contracts* § 90 (1) (1979). That provision will be discussed, infra.

Justice Traynor reasoned that the subcontractor's bid contained an implied subsidiary promise not to revoke the bid. As the court stated:

> "When plaintiff [, a General Contractor,] used defendant's offer in computing his own bid, he bound himself to perform in reliance on defendant's terms. Though defendant did not bargain for the use of its bid neither did defendant make it idly, indifferent to whether it would be used or not. On the contrary it is reasonable to suppose that defendant submitted its bid to obtain the subcontract. It was bound to realize the substantial possibility that its bid would be the lowest, and that it would be included by plaintiff in his bid. It was to its own interest that the contractor be awarded the general contract; the lower the subcontract bid, the lower the general contractor's bid was likely to be and the greater its chance of acceptance and hence the greater defendant's chance of getting [***16] the paving subcontract. Defendant had reason not only to expect plaintiff to rely on its bid but to want him to. Clearly defendant had a stake in plaintiff's reliance on its bid. Given this interest and the fact that plaintiff is bound by his own bid, it is only fair that plaintiff should have at least an opportunity to accept defendant's bid after the general contract has been awarded to him."

Drennan, 51 Cal. 2d at 415, 333 P.2d at 760. The *Drennan* court however did not use "promissory estoppel" as a substitute for the entire contract, as is the doctrine's usual function. Instead, the *Drennan* court, applying the principle of § 90, interpreted the subcontractor's bid to be irrevocable. Justice Traynor's analysis used promissory estoppel as consideration for an implied promise to keep the bid open for a reasonable time. Recovery was then predicated on traditional bilateral contract, with the sub-bid as the offer and promissory estoppel serving to replace acceptance.

n11 *Home Elec. Co. v. Underwood Heating & Air Conditioning Co., 86 N.C. App. 540, 358 S.E.2d 539 (N.C. Ct. App. 1987). See also, The Problem of Offer and Acceptance.*
[***17]

n12 See Williams v. Favret, 161 F.2d 822, 823 n.1 (5th Cir. 1947); Merritt-Chapman & Scott Corp. v. Gunderson Bros. Eng'g Corp., 305 F.2d 659 (9th Cir. 1962). But see Electrical Constr. & Maintenance Co. v. Maeda Pac. Corp., 764 F.2d 619 (9th Cir. 1985) (subcontractor rejected by general contractor could maintain an action in both traditional contract or promissory estoppel). *See Bid Shopping*, at 405-09 (suggesting using "promissory estoppel" to bind generals to subcontractors, as well as subs to generals, in appropriate circumstances).

n13 Bid shopping is the use of the lowest subcontractor's bid as a tool in negotiating lower bids from other subcontractors post-award.

n14 "The general contractor, having been awarded the prime contract, may pressure the subcontractor whose bid was used for *a* particular portion of the work in computing the overall bid on the prime contract to reduce the amount of the bid." Closen & Weiland, at 566 n.6.

[*156] The *Drennan* decision has been very influential. Many states have adopted the reasoning used by Justice Traynor. [***18] *See,* e.g., *Debron Corp. v. National Homes Constr. Corp., 493 F.2d 352 (8th Cir. 1974)* (applying Missouri law); *Reynolds v. Texarkana Constr. Co., 237 Ark. 583, 374 S.W.2d 818 (1964); Mead Assocs. Inc. v. Antonsen, 677 P.2d 434 (Colo. 1984); Illinois Valley Asphalt v. J.F. Edwards Constr. Co., 413 N.E.2d 209, 90 Ill. App. 3d 768, 45 Ill. Dec. 876 (Ill. Ct. App. 1980); Lichtefeld-Massaro, Inc. v. R.J. Manteuffel Co., 806 S.W.2d 42 (Ky. App. 1991); Constructors Supply Co. v. Bostrom Sheet Metal Works, Inc., 291 Minn. 113, 190 N.W.2d 71 (1971); E. A. Coronis Assocs. v. M. Gordon Constr. Co., 90 N.J. Super. 69, 216 A.2d 246 (1966).*

Despite the popularity of the *Drennan* reasoning, the case has subsequently come under some criticism. n11 The criticism centers on the lack of symmetry of detrimental [**528] reliance in the bid process, in that subcontractors are bound to the general, but the general is not bound to the subcontractors. n12 The result is that the general is free to bid shop, n13 bid chop n14, and to encourage bid peddling, n15 to the detriment of

[*157] the subcontractors. One commentator described the problems that these practices create:

> "Bid shopping and peddling [***19] have long been recognized as unethical by construction trade organizations. These 'unethical,' but common practices have several detrimental results. First, as bid shopping becomes common within a particular trade, the subcontractors will pad their initial bids in order to make further reductions during post-award negotiations. This artificial inflation of subcontractor's offers makes the bid process less effective. Second, subcontractors who are forced into post-award negotiations with the general often must reduce their sub-bids in order to avoid losing the award. Thus, they will be faced with a Hobson's choice between doing the job at a loss or doing a less than adequate job. Third, bid shopping and peddling tend to increase the risk of loss of the time and money used in preparing a bid. This occurs because generals and subcontractors who engage in these practices use, without expense, the bid estimates prepared by others. Fourth, it is often impossible for a general to obtain bids far enough in advance to have sufficient time to properly prepare his own bid because of the practice, common among many subcontractors, of holding sub-bids until the last possible moment in order to [***20] avoid pre-award bid shopping by the general. Fifth, many subcontractors refuse to submit bids for jobs on which they expect bid shopping. As a result, competition is reduced, and, consequently, construction prices are increased. Sixth, any price reductions gained through the use of post-award bid shopping by the general will be of no

[*158] benefit to the awarding authority, to whom these price reductions would normally accrue as a result of open competition before the award of the prime contract. Free competition in an open market is therefore perverted because of the use of post-award bid shopping."

Bid Shopping, at 394-96 (citations omitted). *See also Flag Pole*, at 818 (bid mistake cases generally portray general contractor as victim, but market reality is that subs are usually in weaker negotiating position); Jay M. Feinman, *Promissory Estoppel and Judicial Method, 97 HARV. L. REV. 678, 707-08 (1984)*. These problems have caused at least one court to reject promissory estoppel in the contractor-subcontractor relationship. *Home Elec. Co. v. Underwood Heating & Air Conditioning Co., 86 N.C. App. 540, 358 S.E.2d 539 (N.C. Ct. App. 1987). See also* Note, *Construction Contracts-The* [***21] *Problem of Offer and Acceptance in the General Contractor-Subcontractor Relationship, 37 U. CINN. L. REV. 798 (1980)*. But other courts, while aware of the limitations of promissory estoppel, have adopted it nonetheless. *See, e.g., Alaska Bussell Elec. Co. v. Vern Hickel Constr. Co., 688 P.2d 576 (Alaska 1984)*. n16

n15 An unscrupulous subcontractor can save estimating costs, and still get the job by not entering a bid or by entering an uncompetitive bid. After bid opening, this unscrupulous subcontractor, knowing the price of the low sub-bid, can then offer to perform the work for less money, precisely because the honest subcontractor has already paid for the estimate and included that cost in the original bid. This practice is called bid peddling.

n16 The critical literature also contains numerous suggestions that might be undertaken by the legislature to address the problems of bid shopping, chopping, and peddling. *See* Note, *Construction Bidding Problem: Is There a Solution Fair to Both the General Contractor and Subcontractor?*, 19 ST. Louis L. REV. 552, 568-72 (1975) (discussing bid depository and bid listing schemes); *Flag Pole*, at *825-26.*

[***22]

[**529] The doctrine of detrimental reliance has evolved in the time since *Drennan* was decided in 1958. The American Law Institute, responding to *Drennan*, sought to make detrimental reliance more readily applicable to the construction bidding scenario by adding § 87. This new section was intended to make subcontractors' bids binding:

§ " 87. Option Contract

. . .

(2) An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does

[*159] induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice."

Restatement (Second) of Contracts § 87 (1979). n17

n17 This provision was derived from *Restatement (Second) of Contracts* § 89B(2) (Tent. Drafts Nos. 1–7, 1973). There are cases that refer to the tentative drafts. *See Loranger Constr. Corp. v. E. F. Hauserman Co., 384 N.E.2d 176, 179, 376 Mass. 757, 763 (1978). See also* Closen & Weiland, at 593–97.

[***23]

Despite the drafter's intention that $*S 87 of the Restatement (Second) of Contracts* (1979) should replace *Restatement (First) of Contracts* § 90 (1932) in the construction bidding cases, few courts have availed themselves of the opportunity. *But see Arango Constr. Co. v. Success Roofing, Inc., 46 Wash. App. 314, 321–22, 730 P.2d 720, 725 (1986). Section 90 (1) of the Restatement (Second) of Contracts* (1979) modified the first restatement formulation in three ways, by: 1) deleting the requirement that the action of the offeree be "definite and substantial;' 2) adding a cause of action for third party reliance; and 3) limiting remedies to those required by justice. n18

n18 Section 90 of the *Restatement (First) of Contracts* (1932) explains detrimental reliance as follows:

> "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

Section 90 (1) of the Restatement (Second) Contracts (1979) defines the doctrine of detrimental reliance as follows:

> "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires."

[***24]

Courts and commentators have also suggested other solutions intended to bind the parties without the use of detrimental reliance theory. The most prevalent suggestion n19 is the use of the firm offer provision of the Uniform Commercial

[*160] Code. Maryland Code (1992 Repl. Vol.), *§ 2-205 of the Commercial Law Article.* That statute provides:

> "An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror."

In this manner, subcontractor's bids, made in writing and giving some assurance of an intent that the offer be held open, can be found to be irrevocable.

n19 *See Bid Shopping and Peddling* at 399-401; *Finn Offer Problem* at 215; Closen & Weiland, at 604 n.133.

[***25]

The Supreme Judicial Court of Massachusetts has suggested three other traditional theories that might prove the existence of a contractual relationship between a general contractor and a sub: conditional bilateral contract analysis; unilateral contract analysis; and unrevoked offer analysis. *Loranger Constr. Corp. v. E. F. Hauserman Co., 384 N.E.2d 176, 376 Mass. 757 (1978).* If the general contractor could prove that there was an exchange of promises binding the [**530] parties to each other, and that exchange of promises was made before bid opening, that would constitute a valid bilateral promise conditional upon the general being awarded the job. *Loranger, 384 N.E.2d at 180, 376 Mass. at 762.* This directly contrasts with Judge Hand's analysis in *James Baird*, that a general's use of a sub-bid constitutes acceptance conditional upon the award of the contract to the general. *James Baird, 64 F.2d at 345-46.*

Alternatively, if the subcontractor intended its sub-bid as an offer to a unilateral contract, use of the sub-bid in the general's bid constitutes part performance, which renders the initial offer irrevocable under the *Restatement (Second) of Contracts* § 45 (1979). [***26] *Loranger, 384 N.E.2d at 180, 376 Mass. at 762.* This resurrects a second theory dismissed by Judge Learned Hand in *James Baird.*

[*161] Finally, the *Loranger* court pointed out that a jury might choose to disbelieve that a subcontractor had withdrawn the winning bid, meaning that acceptance came before withdrawal, and a traditional bilateral contract was formed. *Loranger, 384 N.E.2d at 180, 376 Mass. at 762-63.* n20

n20 For an excellent analysis of the *Loranger* case, *see* Closen & Weiland at 597-603.

Another alternative solution to the construction bidding problem is no longer seriously considered-revitalizing the common law seal. William Noel Keyes, *Consideration Reconsidered-The Problem of the Withdrawn Bid, 10 STAN. L. REV. 441, 470 (1958).* Because a sealed option contract remains firm without consideration this alternative was proposed as a solution to the construction bidding problem. n21

n21 Of course, general contractors could require their subcontractors to provide their bids under seal. The fact that they do not is testament to the lack of appeal this proposal holds.

[***27]

It is here that the state of the law rests.

III

If PEI is able to prove by any of the theories described that a contractual relationship existed, but Johnson failed to perform its end of the bargain, then PEI will recover the $32,000 in damages caused by Johnson's breach of contract. Alternatively, if PEI is unable to prove the existence of a contractual relationship, then Johnson has no obligation to PEI. We will test the facts of the case against the theories described to determine if such a relationship existed.

The trial court held, and we agree, that Johnson's sub-bid was an offer to contract and that it was sufficiently clear and definite. We must then determine if PEI made a timely and valid acceptance of that offer and thus created a traditional bilateral contract, or in the absence of a valid acceptance, if PEI's detrimental reliance served to bind Johnson to its sub-bid.

[*162] We examine each of these alternatives, beginning with traditional contract theory. n22

n22 Because they were not raised, either below or in this Court, we need not address the several methods in which a court might interpret a subcontractor's bid as a firm, and thus irrevocable, offer. Nevertheless, for the benefit of bench and bar, we review those theories as applied to this case. First, PEI could have purchased an option, thus supplying consideration for making the offer irrevocable. This did not happen. Second, Johnson could have submitted its bid as a sealed offer. Md. Code (1995 Repl. Vol.), *§ 5-102 of the Courts & Judicial Proceedings Article.* An offer under seal supplants the need for consideration to make an offer firm. This did not occur in the instant case. The third method of Johnson's offer becoming irrevocable is by operation of Md. Code (1992 Repl. Vol.), *§ 2-205 of the Commercial Law Article.* We note that Johnson's sub-bid was made in the form of a signed writing, but without further evidence we are unable to determine if the offer "by its terms gives assurance that it will be held open" and if the sub-bid is for "goods" as that term is defined by Md. Code (1994 Repl. Vol.), *§ 2-105 (1) of the Commercial Law Article* and by decisions of this Court, including *Anthony Pools v. Sheehan, 295 Md. 285, 455 A.2d 434 (1983)* and *Burton v. Artery Co., 279 Md. 94, 367 A.2d 935 (1977).*

[***28]

A. TRADITIONAL BILATERAL CONTRACT.

The trial judge found that there was not a traditional contract binding Johnson to PEI. A review of the record and the trial judge's findings make it clear that this was a close question. On appeal however, our job is to assure that the trial judge's findings were [**531] not clearly erroneous. Maryland Rule 8-131 (c). This is an easier task.

The trial judge rejected PEI's claim of bilateral contract for two separate reasons: 1) that there was no meeting of the minds; and 2) that the offer was withdrawn prior to acceptance. Both need not be proper bases for decision; if either of these two theories is not clearly erroneous, we must affirm.

There is substantial evidence in the record to support the judge's conclusion that there was no meeting of the minds. PEI's letter of August 26, to all potential mechanical subcontractors, reproduced *supra*, indicates, as the trial judge found, that PEI and Johnson "did not have a definite, certain meeting of the minds on a certain price for a certain quantity of

[*163] goods . . . ." Because this reason is itself sufficient to sustain the trial judge's finding that no contract was formed, we affirm.

Alternatively, [***29] we hold, that the evidence permitted the trial judge to find that Johnson revoked its offer prior to PEI's final acceptance. We review the relevant chronology. Johnson made its offer, in the form of a sub-bid, on August 5. On September 1, PEI accepted. Johnson withdrew its offer by letter dated September 2. On September 28, NIH awarded the contract to PEI. Thus, PEI's apparent acceptance came one day prior to Johnson's withdrawal.

The trial court found, however, "that before there was ever a final agreement reached with the contract awarding authorities, that Johnson made it clear to [PEI] that they were not going to continue to rely on their earlier submitted bid." Implicit in this finding is the judge's understanding of the contract. Johnson's sub-bid constituted an offer of a contingent contract. PEI accepted that offer subject to the condition precedent of PEI's receipt of the award of the contract from NIH. Prior to the occurrence of the condition precedent, Johnson was free to withdraw. *See* 2 *Williston on Contracts* § 6:14 (4th ed.) . On September 2, Johnson exercised that right to revoke. n23 The trial judge's finding that withdrawal proceeded valid final acceptance [***30] is therefore logical and supported by substantial evidence in the record. It was not clearly erroneous, so we shall affirm.

n23 We have also considered the possibility that Johnson's offer was not to enter into a contingent contract. This is unlikely because there is no incentive for *a* general contractor to accept a non-contingent contract prior to contract award but it would bind the general to purchase the subcontractor's services even if the general did not receive the award. Moreover, PEI's September 1 letter clearly "accepted" Johnson's offer subject to the award from NIH. If Johnson's bid was for a non-contingent contract, PEI's response substantially varied the offer and was therefore a counter-offer, not an acceptance. *Post v. Gillespie, 219 Md. 378, 385-86, 149 A.2d 391, 395-96 (1959); 2 Williston on Contracts* § 6:13 (4th ed.).

[*164] **B. DETRIMENTAL RELIANCE**

PEI's alternative theory of the case is that PEI's detrimental reliance binds Johnson to its bid. We are asked, as a threshold [***31] question, if detrimental reliance applies to the setting of construction bidding. Nothing in our previous cases suggests that the doctrine was intended to be limited to a specific factual setting. The benefits of binding subcontractors outweigh the possible detriments of the doctrine. n24

n24 General contractors, however, should not assume that we will also adopt the holdings of our sister courts who have refused to find general contractors bound to their subcontractors. *See, e.g., N. Litterio & Co. v. Glassman Constr. Co., 115 U.S. App. D.C. 335, 319 F.2d 736 (D.C. Cir. 1963).*

This Court has decided cases based on detrimental reliance as early as 1854, n25 and the general contours of the doctrine are well understood by Maryland courts. The historical development of promissory estoppel, or detrimental reliance, in Maryland has mirrored the development nationwide. It was originally a small exception to the general consideration requirement, and found in "cases dealing with such narrow problems as gratuitous agencies and bailments, [***32] waivers, and promises of marriage settlement." Jay M. Feinman, *Promissory Estoppel and Judicial Method, 97 HARV. L. REV. 678, 680 (1984).* The early Maryland cases applying "promissory [**532] estoppel" or detrimental reliance primarily involve charitable pledges.

n25 *Gittings v. Mayhew, 6 Md. 113 (1854)* .

The leading case is *Maryland Nat'l Bank v. United Jewish Appeal Fed'n of Greater Washington, 286 Md. 274, 407 A.2d 1130 (1979),* where this Court's opinion was authored by the late Judge Charles E. Orth, Jr. In that case, a decedent, Milton Polinger, had pledged $200,000 to the United Jewish Appeal ["UJA"]. The UJA sued Polinger's estate in an attempt to collect the money promised them. Judge Orth reviewed four prior decisions of this Court n26 and determined

[*165] that *Restatement (First) of Contracts* § 90 (1932) applied. *Id. at 281, 407 A.2d at 1134.* Because the Court found that the UJA had not acted in a "definite or substantial" manner in reliance on the contribution, no contract was found to [***33] have been created. *Id. at 289–90, 407 A.2d at 1138–39.*

n26 The cases reviewed were *Gittings v. Mayhew, 6 Md. 113 (1854); Erdman v. Trustees Eutaw M. P. Ch., 129 Md. 595, 99 A. 793 (1917); Sterling v. Cushwa & Sons, 170 Md. 226, 183 A. 593 (1936);* and *American University v. Collings, 190 Md. 688, 59 A.2d 333 (1948).*

Detrimental reliance doctrine has had a slow evolution from its origins in disputes over charitable pledges, and there remains some uncertainty about its exact dimensions. n27 Two cases from the Court of Special Appeals demonstrate that confusion.

n27 Other cases merely acknowledged the existence of a doctrine of "promissory estoppel," but did not comment on the standards for the application of this doctrine. *See, e.g., Chesapeake Supply & Equip. Co. v. Manitowoc Eng'g Corp., 232 Md. 555, 566, 194 A.2d 624, 630 (1963).*

[***34]

The first, *Snyder v. Snyder, 79 Md. App. 448, 558 A.2d 412 (1989),* arose in the context of a suit to enforce an antenuptial agreement. To avoid the statute of frauds, refuge was sought in the doctrine of "promissory estoppel." n28 The court held

[*166] that "promissory estoppel" requires a finding of *fraudulent* conduct on the part of the promisor. *See also Friedman & Fuller v. Funkhouser, 107 Md. App. 91, 666 A.2d 1298 (1995).*

n28 *Section 139 of the Restatement (Second) of Contracts* (1979) provides that detrimental reliance can remove a case from the statute of frauds:

> **"Enforcement by Virtue of Action in Reliance**
>
> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.
>
> *(2)* In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant:
>
> (a) the availability and adequacy of other remedies, particularly cancellation and restitution;
>
> (b) the definite and substantial character of the action or forbearance in relation to the remedy sought;
>
> (c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence;
>
> (d) the reasonableness of the action or forbearance;
>
> (e) the extent to which the action or forbearance was foreseeable by the promisor."

[***35]

The second, *Kiley v. First Nat'l Bank, 102 Md. App. 317, 649 A.2d 1145 (1994),* the court stated that "it is unclear whether Maryland continues to adhere to the more stringent formulation of promissory estoppel, as set forth in the original *Restatement of Contracts*, or now follows the more flexible view found in the *Restatement (Second) Contracts." Id. at 336, 649 A.2d at 1154.*

To resolve these confusions we now clarify that Maryland courts are to apply the test of the *Restatement (Second) of Contracts* § 90 (1) (1979), which we have recast as a four-part test:

> **I. a clear and definite promise;**
>
> **2. where the promisor has a reasonable expectation that the offer will induce action or forbearance on the part of the promisee;**
>
> **3. which does induce actual and reasonable action or forbearance by the promisee; and**
>
> **4. causes a detriment which can only be avoided by the enforcement of the promise. n29**

[*167] [**533] In a construction bidding case, where the general contractor seeks to bind the subcontractor to the sub-bid offered, the general must first prove that the subcontractor's sub-bid constituted an offer to perform a job at a given [***36] price. We do not express a judgment about how precise a bid must be to constitute an offer, or to what degree a general contractor may request to change the offered scope before an acceptance becomes a counter-offer. That fact-specific judgment is best reached on a case-by-case basis. In the instant case, the trial judge found that the sub-bid was sufficiently clear and definite to constitute an offer, and his finding was not clearly erroneous.

n29 This comports with the formulation given by the United States District Court for the District of Maryland in *Union Trust Co. of Md. v. Charter Medical Corp., 663 F. Supp. 175, 178 n.4 (D.Md. 1986) aff'd w/o opinion, 823 F.2d 548 (4th Cir. 1987).*

We have adopted language of the *Restatement (Second) of Contracts* (1979) because we believe each of the three changes made to the previous formulation were for the better. As discussed earlier, the first change was to delete the requirement that the action of the offeree be "definite and substantial." Although the Court of Special Appeals in *Kiley v. First Nat'l Bank, 102 Md. App. 317, 336, 649 A.2d 1145, 1154 (1994)* apparently presumed this to be a major change from the "stringent" first restatement to the "more flexible" second restatement, we perceive the language to have always been redundant. If the reliance is not "substantial and definite" justice will not compel enforcement.

The decisions in *Snyder v. Snyder, 79 Md. App. 448, 558 A.2d 412 (1989)* and *Friedman & Fuller v. Funkhouser, 107 Md. App. 91, 666 A.2d 1298 (1995)* to the extent that they required a showing of fraud on the part of the offeree are therefore disapproved.

[***37]

Second, the general must prove that the subcontractor reasonably expected that the general contractor would rely upon the offer. The subcontractor's expectation that the general contractor will rely upon the sub-bid may dissipate through time. n30

n30 We expect that evidence of "course of dealing" and "usage of the trade," *see Restatement (Second) of Contracts* § 219-223 (1979), will provide strong indicies of the reasonableness of a subcontractor's expectations.

In this case, the trial court correctly inquired into Johnson's belief that the bid remained open, and that consequently PEI was not relying on the Johnson bid. The judge found that due to the time lapse between bid opening and award, "it would be unreasonable for offers to continue." This is supported by the substantial evidence. James Kick testified that although he knew of his bid mistake, he did not bother to notify PEI because J J. Kirlin, Inc., and not PEI, was the apparent low bidder. The trial court's finding that Johnson's reasonable [***38] expectation had dissipated in the span of a month is not clearly erroneous.

As to the third element, a general contractor must prove that he actually and reasonably relied on the subcontractor's sub-bid. We decline to provide a checklist of potential methods of proving this reliance, but we will make several

[*168] observations. First, a showing by the subcontractor, that the general contractor engaged in "bid shopping," or actively encouraged "bid chopping," or "bid peddling" is strong evidence that the general did *not* rely on the sub-bid. Second, prompt notice by the general contractor to the subcontractor that the general intends to use the sub on the job, is weighty evidence that the general *did* rely on the bid. n31 Third, if a sub-bid is so low that a reasonably prudent general contractor would not rely upon it, the trier of fact may infer that the general contractor did not in fact rely upon the erroneous bid.

n31 Prompt notice and acceptance also significantly dispels the possibility of bid shopping, bid chopping, and bid peddling.

[***39]

In this case, the trial judge did not make a specific finding that PEI failed to prove its reasonable reliance upon Johnson's sub-bid. We must assume, however, that it was his conclusion based on his statement that "the parties did not have a definite, certain meeting of the minds on a certain price for a certain quantity of goods and wanted to renegotiate . . . ." The August 26, 1993, fax from PEI to all prospective mechanical subcontractors, is evidence supporting this conclusion. Although the finding that PEI did not rely on Johnson's bid was indisputably a close call, it was not clearly erroneous.

Finally, as to the fourth prima facie element, the trial court, and not a jury, must determine that binding the subcontractor is necessary to prevent injustice. This element is to be enforced as required by common law [**534] equity courts-the general contractor must have "clean hands." This requirement includes, as did the previous element, that the general did not engage in bid shopping, chopping or peddling, but also requires the further determination that justice compels the result. The fourth factor was not specifically mentioned by the trial judge, but we may infer that he did not find [***40] this case to merit an equitable remedy.

Because there was sufficient evidence in the record to support the trial judge's conclusion that PEI had not proven

[*169] its case for detrimental reliance, we must, and hereby do, affirm the trial court's ruling.

V

In conclusion, we emphasize that there are different ways to prove that a contractual relationship exists between a general contractor and its subcontractors. Traditional bilateral contract theory is one. Detrimental reliance can be another. However, under the evidence in this case, the trial judge was not clearly erroneous in deciding that recovery by the general contractor was not justified under either theory.

JUDGMENT AFFIRMED, WITH COSTS.

LEXSEE 408 US 593

PERRY ET AL. v. SINDERMANN

No. 70-36

SUPREME COURT OF THE UNITED STATES

408 U.S. 593; 92 S. Ct. 2694; 33 L. Ed. 2d 570; 1972 U.S. LEXIS 20; 1 I.E.R. Cas. (BNA) 33

January 18, 1972, Argued
June 29, 1972, Decided

PRIOR HISTORY:

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

DISPOSITION:

430 F.2d 939, affirmed.

LexisNexis(R) Headnotes

SYLLABUS:

Respondent was employed in a state college system for 10 years, the last four as a junior college professor under a series of one-year written contracts. The Regents declined to renew his employment for the next year, without giving him an explanation or prior hearing. Respondent then brought this action in the District Court, alleging that the decision not to rehire him was based on respondent's public criticism of the college administration and thus infringed his free speech right, and that the Regents' failure to afford him a hearing violated his procedural due process right. The District Court granted summary judgment for petitioners, concluding that respondent's contract had terminated and the junior college had not adopted the tenure system. The Court of Appeals reversed on the grounds that, despite lack of tenure, nonrenewal of respondent's contract would violate the Fourteenth Amendment if it was in fact based on his protected free speech, and that if respondent could show that he had an "expectancy" of re-employment, the failure to allow him an opportunity for a hearing would violate the procedural due process guarantee. *Held*:

1. Lack of a contractual or tenure right to re-employment, taken alone, did not defeat respondent's claim that the nonrenewal of his contract violated his free speech right under the First and Fourteenth Amendments. The District Court therefore erred in foreclosing determination of the contested issue whether the decision not to renew was based on respondent's exercise of his right of free speech. Pp. 596-598.

2. Though a subjective "expectancy" of tenure is not protected by procedural due process, respondent's allegation that the college had a *de facto* tenure policy, arising from rules and understandings officially promulgated and fostered, entitled him to an opportunity of proving the legitimacy of his claim to job tenure. Such proof would obligate the college to afford him a requested hearing where he could be informed of the grounds for his nonretention and challenge their sufficiency. Pp. 599-603.

COUNSEL:

W. O. Shafer argued the cause for petitioners. With him on the brief was Lucius D. Bunton.

Michael H. Gottesman argued the cause for respondent. With him on the brief were George H. Cohen and Warren Burnett.

Briefs of amici curiae urging affirmance were filed by David Rubin and Richard J. Medalie for the National Education Association; by John Ligtenberg and Andrew J. Leahy for the American Federation of Teachers; and by Herman I. Orentlicher and William W. Van Alstyne for the American Association of University Professors.

JUDGES:

Stewart, J., delivered the opinion of the Court, in which Burger, C. J., and White, Blackmun, and Rehnquist, JJ., joined. Burger, C. J., filed a concurring opinion, post, p. 603. Brennan, J., filed an opinion dissenting in part, in which Douglas, J., joined, post, p. 604. Marshall, J., filed an opinion dissenting in part, post, p. 605. Powell, J., took no part in the decision of the case.

OPINIONBY:

STEWART

OPINION:

[*594] [***575] [**2696] MR. JUSTICE STEWART delivered the opinion of the Court.

From 1959 to 1969 the respondent, Robert Sindermann, was a teacher in the state college system of the State of Texas. After teaching for two years at the University of Texas and for four years at San Antonio Junior College, he became a professor of Government and Social Science at Odessa Junior College in 1965. He was employed at the college for four successive years, under a series of one-year contracts. He was successful enough to be appointed, [***576] for a time, the cochairman of his department.

During the 1968-1969 academic year, however, controversy arose between the respondent and the college administration. The respondent was elected president of the Texas Junior College Teachers Association. In this capacity, he left his teaching duties on several occasions to testify before committees of the Texas Legislature,

[*595] and he became involved in public disagreements with the policies of the college's Board of Regents. In particular, he aligned himself with a group advocating the elevation of the college to four-year status — a change opposed by the Regents. And, on one occasion, a newspaper advertisement appeared over his name that was highly critical of the Regents.

Finally, in May 1969, the respondent's one-year employment contract terminated and the Board of Regents voted not to offer him a new contract for the next academic year. The Regents issued a press release setting forth allegations of the respondent's insubordination. n1 But they provided him no official statement of the reasons for the nonrenewal of his contract. And they allowed him no opportunity for a hearing to challenge the basis of the nonrenewal.

n1 The press release stated, for example, that the respondent had defied his superiors by attending legislative committee meetings when college officials had specifically refused to permit him to leave his classes for that purpose.

The respondent then brought this action in Federal District Court. He alleged primarily that the Regents' decision not to rehire him was based on his public criticism of the policies of the college administration and thus infringed his right to freedom of speech. He also alleged that their failure to provide him an opportunity for a hearing violated the Fourteenth Amendment's guarantee of procedural due process. The petitioners — members of the Board of Regents and the president of the college — denied that their decision was made in retaliation for the respondent's public criticism and argued that they had no obligation to provide a hearing. n2 On the basis of these bare pleadings and three

[*596] brief affidavits filed by the respondent, n3 the District Court granted summary judgment for the petitioners. [**2697] It concluded that the respondent had "no cause of action against the [petitioners] since his contract of employment terminated May 31, 1969, and Odessa Junior College has not adopted the tenure system." n4

n2 The petitioners claimed, in their motion for summary judgment, that the decision not to retain the respondent was really based on his insubordinate conduct. See n. 1, *supra*.

n3 The petitioners, for whom summary judgment was granted, submitted no affidavits whatever. The respondent's affidavits were very short and essentially repeated the general allegations of his complaint.

n4 The findings and conclusions of the District Court — only several lines long — are not officially reported.

The Court of Appeals reversed the judgment of the District Court. *430 F.2d 939*. First, it held that, despite the respondent's lack of tenure, the nonrenewal of his contract would violate the Fourteenth Amendment if it in fact was based on his protected free speech. Since the actual reason for the Regents' decision was "in total dispute" in the pleadings, the court remanded the case for a full hearing on this contested issue of fact. *Id., at 942-943*. Second, the Court of [***577] Appeals held that, despite the respondent's lack of tenure, the failure to allow him an opportunity for a hearing would violate the constitutional guarantee of procedural due process if the respondent could show that he had an "expectancy" of reemployment. It, therefore, ordered that this issue of fact also be aired upon remand. *Id., at 943-944*. We granted a writ of certiorari, *403 U.S. 917*, and we have considered this case along with *Board of Regents* v. *Roth, ante*, p. 564.

I

[***HR1] The first question presented is whether the respondent's lack of a contractual or tenure right to reemployment, taken alone, defeats his claim that the nonrenewal of his contract violated the First and Fourteenth Amendments. We hold that it does not.

[*597]

[***HR2] [***HR3] For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser v. Randall, 357 U.S. 513, 526.* Such interference with constitutional rights is impermissible.

We have applied this general principle to denials of tax exemptions, *Speiser v. Randall, supra,* unemployment benefits, *Sherbert v. Verner, 374 U.S. 398, 404-405,* and welfare payments, *Shapiro v. Thompson, 394 U.S. 618, 627 n. 6; Graham v. Richardson, 403 U.S. 365, 374.* But, most often, we have applied the principle to denials of public employment. *United Public Workers v. Mitchell, 330 U.S. 75, 100; Wieman v. Updegraff, 344 U.S. 183, 192; Shelton v. Tucker, 364 U.S. 479, 485-486; Torcaso v. Watkins, 367 U.S. 488, 495-496; Cafeteria Workers v. McElroy, 367 U.S. 886, 894; Cramp v. Board of Public Instruction, 368 U.S. 278, 288; Baggett v. Bullitt, 377 U.S. 360; Elfbrandt v. Russell, 384 U.S. 11, 17; Keyishian v. Board of Regents, 385 U.S. 589, 605-606; Whitehill v. Elkins, 389 U.S. 54; United States v. Robel, 389 U.S. 258; Pickering v.* [**2698] *Board of Education, 391 U.S. 563, 568.* We have applied the principle regardless of the public employee's contractual or other claim to a job. Compare *Pickering v. Board of Education, supra,* with *Shelton v. Tucker, supra.*

[***578]

[***HR4] Thus, the respondent's lack of a contractual or tenure

[*598] "right" to re-employment for the 1969-1970 academic year is immaterial to his free speech claim. Indeed, twice before, this Court has specifically held that the nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights. *Shelton v. Tucker, supra; Keyishian v. Board of Regents, supra.* We reaffirm those holdings here.

In this case, of course, the respondent has yet to show that the decision not to renew his contract was, in fact, made in retaliation for his exercise of the constitutional right of free speech. The District Court foreclosed any opportunity to make this showing when it granted summary judgment. Hence, we cannot now hold that the Board of Regents' action was invalid.

[***HR5] But we agree with the Court of Appeals that there is a genuine dispute as to "whether the college refused to renew the teaching contract on an impermissible basis — as a reprisal for the exercise of constitutionally protected rights." *430 F.2d, at 943.* The respondent has alleged that his nonretention was based on his testimony before legislative committees and his other public statements critical of the Regents' policies. And he has alleged that this public criticism was within the First and Fourteenth Amendments' protection of freedom of speech. Plainly, these allegations present a bona fide constitutional claim. For this Court has held that a teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment. *Pickering v. Board of Education, supra.*

[***HR6] For this reason we hold that the grant of summary judgment against the respondent, without full exploration of this issue, was improper.

[*599] II

[***HR7] The respondent's lack of formal contractual or tenure security in continued employment at Odessa Junior College, though irrelevant to his free speech claim, is highly relevant to his procedural due process claim. But it may not be entirely dispositive.

[***HR8] We have held today in *Board of Regents* v. *Roth, ante*, p. 564, that the Constitution does not require opportunity for a hearing before the nonrenewal of a nontenured teacher's contract, unless he can show that the decision not to rehire him somehow deprived him of an interest in "liberty" or that he had a "property" interest in continued employment, despite the lack of tenure or a formal contract. In *Roth* the teacher had not made a showing on either point to justify summary judgment in his favor.

[***HR9] Similarly, the respondent here has yet to show that he has been deprived of an interest that could invoke procedural due process protection. As in *Roth*, the mere showing that he was not rehired in one particular job, without more, did not amount to a showing of a loss of [***579] liberty. n5 Nor did it amount to a showing of a loss of property.

n5 The Court of Appeals suggested that the respondent might have a due process right to some kind of hearing simply if he *asserts* to college officials that their decision was based on his constitutionally protected conduct. *430 F.2d, at 944.* We have rejected this approach in *Board of Regents* v. *Roth, ante*, at 575 n. 14.

But the respondent's allegations — which we must construe most favorably to the respondent at this stage of the litigation — do raise a genuine issue [**2699] as to his interest in continued employment at Odessa Junior College. He alleged that this interest, though not secured by a formal contractual tenure provision, was secured by a no less binding understanding fostered by the college administration.

[*600] In particular, the respondent alleged that the college had a *de facto* tenure program, and that he had tenure under that program. He claimed that he and others legitimately relied upon an unusual provision that had been in the college's official Faculty Guide for many years:

"*Teacher Tenure*: Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work."

Moreover, the respondent claimed legitimate reliance upon guidelines promulgated by the Coordinating Board of the Texas College and University System that provided that a person, like himself, who had been employed as a teacher in the state college and university system for seven years or more has some form of job tenure. n6

[*601] Thus, the respondent offered to prove that a teacher with his long period of service at this particular State College had no less a "property" interest in continued employment than a formally tenured teacher at other colleges, and had no less a procedural due process right to a statement of reasons and a hearing before college officials upon their decision not to retain him.

n6 The relevant portion of the guidelines, adopted as "Policy Paper 1" by the Coordinating Board on October 16, 1967, reads:

"A. Tenure

"Tenure means assurance to an experienced faculty member that he may expect to continue in his academic position unless adequate cause for dismissal is demonstrated in a fair hearing, following established procedures of due process.

"A specific system of faculty tenure undergirds the integrity of each academic institution. In the Texas public colleges and universities, this tenure system should have these components:

"(1) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period for a faculty member shall not exceed seven years, including within this period appropriate full-time service in all institutions of higher education. This is subject to the provision that when, after a term of probationary service of more than three years in one or more institutions, a faculty member is employed by another institution, it may be agreed in writing that his new appointment is for a probationary period of not more than four years (even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years).

. . . .

"(3) Adequate cause for dismissal for a faculty member with tenure may be established by demonstrating professional incompetence, moral turpitude, or gross neglect of professional responsibilities."

The respondent alleges that, because he has been employed as a "full-time instructor" or professor within the Texas College and University System for 10 years, he should have "tenure" under these provisions.

[***HR10] [***HR11] We [***580] have made clear in *Roth, supra*, at 571-572, that "property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." *Id.*, at 577. A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing. *Ibid.*

[***HR12] [***HR13] [***HR14] A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient "cause" is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a [**2700] teacher has a "property" interest in re-employment. For example, the law of contracts in most, if not all, jurisdictions long has employed

[*602] a process by which agreements, though not formalized in writing, may be "implied." 3 A. Corbin on Contracts §§ 561-572A (1960). Explicit contractual provisions may be supplemented by other agreements implied from "the promisor's words and conduct in the light of the surrounding circumstances." *Id.*, at § 562. And, "the meaning of [the promisor's] words and acts is found by relating them to the usage of the past." *Ibid.*

[***HR15] A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service — and from other relevant facts — that he has a legitimate claim of entitlement to job tenure. Just as this Court has found there to be a "common law of a particular industry or of a particular plant" that may supplement a collective-bargaining agreement, *Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 579,* so there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university, like Odessa Junior College, that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice. See C. Byse & L. Joughin, Tenure in American Higher Education 17-28 (1959). n7

n7 We do not now hold that the respondent has any such legitimate claim of entitlement to job tenure. For "property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents* v. *Roth, supra*, at 577. If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim would be defeated.

[***HR16] [***HR17] [***HR18] In this case, the respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent "sufficient

[*603] cause." We disagree with the Court of Appeals insofar as it held that a mere subjective "expectancy" is protected by procedural due process, but we agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of "the policies and practices of the institution." *430 F.2d, at 943.* Proof of such a property [***581] interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency.

Therefore, while we do not wholly agree with the opinion of the Court of Appeals, its judgment remanding this case to the District Court is

Affirmed.

MR. JUSTICE POWELL took no part in the decision of this case.

CONCURBY:

BURGER

CONCUR:

MR. CHIEF JUSTICE BURGER, concurring. *

* This opinion applies also to No. 71-162, *Board of Regents of State Colleges et al.* v. *Roth, ante*, p. 564.

I concur in the Court's judgments and opinions in *Sindermann* and *Roth*, but there is one central point in both decisions that I would like to underscore since it may have been obscured in the comprehensive discussion of the cases. That point is that the relationship between a state institution and one of its teachers is essentially a matter of state concern and state law. The Court holds today only that a state-employed teacher who has a right to re-employment under state law, arising from either an express or implied contract, has, in turn, a right guaranteed by the Fourteenth Amendment to some form of prior administrative or academic hearing on the cause

[*604] for nonrenewal of his contract. Thus, whether a particular teacher in a particular context has any right to such administrative hearing hinges on a question of state law. The Court's opinion makes this point very sharply:

"Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents* v. *Roth, ante*, at 577.

Because the availability of the Fourteenth Amendment right to a prior administrative hearing turns in each case on a question of state law, the issue of abstention will arise in future cases contesting whether a particular teacher is entitled to a hearing prior to nonrenewal of his contract. If relevant state contract law is unclear, a federal court should, in my view, abstain from deciding whether he is constitutionally entitled to a prior hearing, and the teacher should be left to resort to state courts on the questions arising under state law.

DISSENTBY:

BRENNAN (In Part); MARSHALL (In Part)

DISSENT:

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS joins, dissenting in No. 71-162, *ante*, p. 564, and dissenting in part in No. 70-36.

Although I agree with Part I of the Court's opinion in No. 70-36, I also agree with my Brother MARSHALL that "respondent[s] [were] denied due process when [their] contract[s] [were] not renewed and [they were] not informed of the reasons and given an opportunity to respond." *Ante*, at 590. Since respondents were entitled to summary judgment on that issue, I would affirm the judgment of the Court of Appeals in No. 71-162, and, to the extent indicated by my Brother MARSHALL, I would modify [***582] the judgment of the Court of Appeals in No. 70-36.

[*605] MR. JUSTICE MARSHALL, dissenting in part.

Respondent was a teacher in the state college system of the State of Texas for a decade before the Board of Regents of Odessa Junior College decided not to renew his contract. He brought this suit in Federal District Court claiming that the decision not to rehire him was in retaliation for his public criticism of the policies of the college administration in violation of the First Amendment, and that because the decision was made without giving him a statement of reasons and a hearing, it denied him the due process of law guaranteed by the Fourteenth Amendment. The District Court granted summary judgment for petitioners, but the Court of Appeals reversed and remanded the case for further [**2701] proceedings. This Court affirms the judgment of the Court of Appeals.

I agree with Part I of the Court's opinion holding that respondent has presented a bona fide First Amendment claim that should be considered fully by the District Court. But, for the reasons stated in my dissenting opinion in *Board of Regents* v. *Roth*, No. 71-162, *ante*, p. 587, I would modify the judgment of the Court of Appeals to direct the District Court to enter summary judgment for respondent entitling him to a statement of reasons why his contract was not renewed and a hearing on disputed issues of fact.

REFERENCES: Return To Full Text Opinion

15 Am Jur 2d, Colleges and Universities 11 - 15; 16 Am Jur 2d, Constitutional Law 341 - 352, 358 - 381, 542 - 584

5 Am Jur Pl & Pr Forms (Rev ed), Colleges and Universities, Forms 1-8

22 Am Jur Proof of Facts 563, Dismissal of Teachers for Cause

US L Ed Digest, Colleges and Universities 1; Constitutional Law 103, 104, 521, 527, 530, 538, 717, 803.5, 925, 935.5, 940; Contracts 49, 58, 62, 81; Specific Performance 10

ALR Digests, Colleges and Universities 1, 1.5; Constitutional Law 441 et seq.

L Ed Index to Anno (Rev ed), Civil Rights; Colleges and Universities; Due Process of Law; Freedom of Speech, Press, Religion and Assembly; Officers; Schools

ALR Quick Index, Colleges and Universities; Constitutional Law; Due Process of Law; Freedom of Speech and Press; Public Officers and Employees; Schools

Federal Quick Index, Civil Rights; Colleges and Universities; Due Process of Law; Educational Institutions; Freedom of Speech and Press; Public Officers and Employees; Schools and School Districts

Annotation References:

Freedom of speech and press as bar to state action under due process clause. 93 L Ed 1151, 2 L Ed 2d 1706, 11 L Ed 2d 1116, 16 L Ed 2d 1053, 21 L Ed 2d 976.

Sufficiency of notice of intention to discharge teacher, or not to renew contract, under statutes requiring such notice. 92 ALR2d 751.

Constitutionality of regulation for dismissal or rejection of public school teacher because of disloyalty. 27 ALR 2d 487.

Control by government of actions or speech of public officers or employees in respect of matters outside the actual performance of their duties. 163 ALR 1358.

Teacher's tenure statutes. 110 ALR 791, 113 ALR 1495, 127 ALR 1298.

LEXSEE 327 F3D 307

CHERYL A. PETERS, Plaintiff-Appellant, v. TIMOTHY JENNEY, Individually and in his official capacity as Superintendent of Schools; K. EDWIN BROWN, Individually and in his official capacity as Assistant Superintendent for Accountability; NANCY GUY, Individually and in her official capacity as a School Board Member; SHEILA MAGULA, Individually and in her official capacity as Associate Superintendent for Curriculum and Instruction; SCHOOL BOARD OF THE CITY OF VIRGINIA BEACH, VIRGINIA, Defendants-Appellees. UNITED STATES OF AMERICA, Amicus Supporting Appellant.

No. 01-2413

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

327 F.3d 307; 2003 U.S. App. LEXIS 7540

June 4, 2002, Argued
April 22, 2003, Decided

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Tommy E. Miller, Magistrate Judge. (CA-01-120-2).

DISPOSITION: Vacated and remanded.

LexisNexis(R) Headnotes

COUNSEL: ARGUED: Kristen M. Galles, EQUITY LEGAL, Alexandria, Virginia, for Appellant.

Seth Michael Galanter, Appellate Section, Civil Rights Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae.

Richard Hoyt Matthews, PENDER & COWARD, P.C., Virginia Beach, Virginia, for Appellees.

ON BRIEF: Deborah C. Waters, RUTTER, WALSH, MILLS & RUTTER, L.L.P., Norfolk, Virginia, for Appellant.

Ralph F. Boyd, Jr., Assistant Attorney General, Dennis J. Dimsey, Appellate Section, Civil Rights Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae.

Paul A. Driscoll, PENDER & COWARD, P.C., Virginia Beach, Virginia, for Appellees.

JUDGES: Before WIDENER, WILLIAMS, and MOTZ, Circuit Judges.

OPINIONBY: WILLIAMS

OPINION: [*310] WILLIAMS, Circuit Judge:

Dr. Cheryl Peters appeals from the district court's n1 grant of summary judgment rejecting her retaliation claims under Title VI of the Civil Rights Act of 1964, *42 U.S.C.A. § 2000d (West 1994)*, *42 U.S.C.A. § 1983 (West 1994)* [**2] , and the *First Amendment to the U.S. Constitution* against the Virginia Beach School Board (the School Board or Board) and various individuals associated with the Virginia Beach School District. n2 Because we conclude that Title VI provides a cause of action for retaliation based upon opposition to practices that Title VI forbids, we vacate the district court's grant of summary judgment and remand to provide the parties with an opportunity to further develop the record regarding the nature of the practices that Peters opposed as well as to address other relevant issues. Because we conclude that

[*311] Peters adequately pleaded a *First Amendment* retaliation claim and presented evidence sufficient to survive summary judgment as to the requisite causal relationship between her advocacy of changes to the gifted program and the nonrenewal of her contract, we vacate the district court's entry of summary judgment on Peters's *First Amendment* claim.

n1 By consent of the parties, the district court referred this case to a magistrate judge to conduct all proceedings pursuant to *Federal Rule of Civil Procedure 73* and *28 U.S.C.A. § 636 (West 1993 & Supp. 2001)*.

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n2 Appellee Virginia Beach School Board is the statutory controlling body for the Virginia Beach School District. Appellee Timothy Jenney is the district's Superintendent of Schools. Appellee K. Edwin Brown is the assistant superintendent for accountability. Appellee Sheila Magula is the associate superintendent for curriculum and instruction. Appellee Nancy Guy is an individual member of the Board. All appellees collectively will be referred to as "Appellees."

I.

A.

Peters, who is Caucasian, is a specialist in gifted education and holds a doctorate in that field. She was hired in 1997 by the school board as the Director of Gifted Education and Magnet Programs. At the time she was hired, there were three African-Americans on the Board. Peters was recruited from the Rockfield, Illinois public schools, where she worked to effect compliance with a desegregation order, and she also advised other school districts on a consulting basis regarding Title VI compliance issues.

When Peters was hired, Virginia Beach Superintendent of Schools Timothy Jenney was aware that the Office of Civil Rights of [**4] the U.S. Department of Education (OCR) was considering a discrimination complaint filed by Curtis W. Harris, the President of the Virginia chapter of the Southern Christian Leadership Conference (SCLC). The complaint alleged that the school district had violated *Title VI of the Civil Rights Act of 1964* by (1) failing to place black students in gifted programs on a proportionate basis; (2) failing to hire and promote black teachers and administrators on a proportionate basis; (3) "inappropriately" transferring black teachers and administrators; (4) discriminatorily assigning students to classes and/or ability groups; and (5) disciplining black students on a disproportionate basis. n3 Jenney was aware that Peters was experienced in complying with the requests of the OCR, but Peters was not aware of the SCLC complaint at the time she was hired.

n3 Importantly, each of these charges was framed in disparate impact terms, focusing on the "proportionality" of representation along various dimensions rather than any intentionally discriminatory practice.

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Within a few weeks after Peters was hired by the school district, Jenney called her to his office to discuss the complaint pending before the OCR and the need to "get OCR off [the school district's] back." (J.A. at 259.) Peters was directed to talk to the OCR, attempt to satisfy it, write an action plan to respond to its concerns, and successfully "handle" the concerns of parents regarding any changes to the gifted program caused by the school district's OCR concerns. (J.A. at 259.) Peters told the OCR that she perceived a "willingness, indeed commitment" on the part of the school district's administration to "provide equitable opportunities for all students." (J.A. at 121.) She developed an eight-point "Action Plan" for the gifted program (the Plan), which in relevant part called for increased efforts to retain minority students in the program, better training of staff and teachers to recognize giftedness, expansion of recruitment efforts directed towards minority students, and enhanced efforts to inform parents and students about the program and about the "characteristics of giftedness." (J.A. at 495.) Jenney and the Board approved the Plan, and Peters asserts that the OCR "accepted" [**6] the Plan. (Appellant's Br. at 6.) In 2001, the OCR commended Jenney for "evidencing a strong commitment to ensuring equal access to gifted education and promoting educational excellence and opportunity for all students." (J.A. at 180.)

[*312] Peters also developed an in-depth program model which partially was focused on improving minority participation in the program. One major element of this plan involved converting a gifted elementary school, known as the Old Donation Center (ODC), from operation on a one-day-a-week basis, with gifted students attending their home schools the other four days per week, to a full-time, five-days-a-week gifted school. Further, the plan called for the establishment of a gifted resource program in each school for students who were not admitted to ODC. Peters also promoted blanket testing of all first and third grade students, which she asserts was to be conducted in a manner that would make the identification process more "inclusionary." n4 (J.A. at 264.)

> n4 Some evidence indicates that the Virginia Beach gifted program identifies as gifted a less than proportionate number of black students. (J.A. at 303, 305.) Some evidence further indicates that, when the "gifted" status of students is evaluated using achievement test scores, the percentage of gifted black students in the overall student population is greater than the percentage of black students in the gifted program. (J.A. at 305.) Thus, some evidence indicates that the selection procedures employed by the school district's gifted program under-identified black students as eligible for the gifted program.

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In March of 1998, the School Board approved Peters's program model. Her relations with the school district's administration deteriorated, however, after her supervisor, Michael O'Hara, was replaced by Sheila Magula, who allegedly told Peters that she was opposed to Peters's program model. During a July 16, 1998, meeting, Magula complained to Peters of numerous performance inadequacies, ranging from nonresponsiveness to media inquiries to missed deadlines, a failure to return important telephone calls, and a failure to select the best applicants for positions at ODC and as gifted resource teachers in schools other than ODC. On September 1, 1998, Magula reprimanded Peters for missing work without an approved absence and recommended that she be docked one day's pay. According to Peters, the absence in question occurred because she needed to obtain medical treatment. On October 26, 1998, Jenney reprimanded Peters for failing to meet deadlines, failing to adhere to accepted employment practices in hiring teachers, and engaging in various alleged incidents of unprofessional conduct involving missed meetings, a lack of understanding of budgeting processes, and nonresponsiveness to various [**8] of Jenney's inquiries. Jenney also stated that "there is a tremendous amount of evidence that circumstantially links [Peters] with a great deal of . . . unrest in the gifted and talented community." n5 (J.A. at 49.)

> n5 Peters asserts that Jenney asked her to cease meeting with groups of minority parents, as she was "stirring them up and causing problems." (J.A. at 269.) Neither party, however, provides specific information regarding the nature of any statements she made which allegedly "stirred up" parents. Peters alleges that during one meeting with parents in January 1999, minority parents told her that when they asked Jenney what programs were available for their children, he referred to the school lunch program.

Sometime in November of 1998, Jenney recommended that Peters be suspended from her position. After opposition developed among some parents, Jenney gave Peters a "second chance," but he placed her under the supervision of defendant K. Edwin Brown, the Assistant Superintendent for Accountability. [**9] Jenney asserts that he took this step because of his concerns that personality conflicts with Magula might be responsible for Peters's difficulties. On February 17, 1999, after supervising Peters for approximately ten weeks, Brown concluded that she

[*313] had failed to improve her performance and recommended that Jenney terminate her immediately. Brown stated that he recommended terminating Peters because "she was incapable of leading the gifted program in a responsible, responsive manner." n6 (J.A. at 45.) Jenney initially concurred in Brown's recommendation but withdrew his dismissal recommendation to the School Board prior to commencing a public hearing on the dismissal. Instead, Jenney decided to pursue nonrenewal of Peters's contract. Jenney avers that he was dissatisfied with Peters's performance because she missed meetings, failed to communicate with appropriate persons in the school district, inadequately planned and implemented changes to the gifted program, and caused divisions and controversy in the program. Forty out of fifty-three of the principals surveyed by Brown several months prior to the non-renewal of Peters's contract felt that "the gifted program lacks focus or direction" [**10] and that "there are serious issues which interfere with the effectiveness of the gifted resource program in their schools." (J.A. at 51.)

n6 Peters alleges that Brown told her that he had initially opposed her appointment because he was concerned that she would be too "militant about minority issues" based upon her background, which Brown felt displayed no understanding of local culture. (J.A. at 220.)

In March of 1999, the School Board, on a 10-1 vote, declined to renew Peters's probationary contract. The one dissenting member of the Board favored terminating Peters immediately rather than simply declining to renew her contract. It is undisputed that minority enrollment in the gifted program increased each year after Peters's departure.

Peters claims that, in the sequence of events leading to the nonrenewal of her contract, the defendants thoroughly undermined her effectiveness in a manner "designed to sabotage" her "efforts to implement an equitable program for all children in Virginia Beach." (J.A. at 222.) [**11] Peters asserts generally that the school district was plagued by "numerous areas of discrimination" and "serious equity problems," which were deemed "appropriate for the Virginia Beach culture" by Appellees. (J.A. at 258-59.) She states that she viewed her job as "correcting horrendous discrimination" by "consciously [running] every . . . aspect of the [gifted] program through an equity filter" in order to "proactively support[] the needs and rights of minority children." (J.A. at 260-61.) She claims that defendant Brown had "maintained programming and an identification process that favored children from white, affluent, influential families and excluded minority children." (J.A. at 263.)

B.

Following the nonrenewal of her contract, Peters filed this action on February 16, 2001, claiming that Jenney, as well as others connected with the school district, violated her rights under Title VI, discharged her in retaliation for the exercise of her *First Amendment* rights in violation of *§ 1983*, and defamed her under Virginia common law. Appellees filed a motion for summary judgment on October 9, 2001. Peters filed an opposition on October 27, 2001. Appellees filed a rebuttal limited [**12] to the issue of Peters's defamation claim on or about October 26, 2001. The district court held a hearing on October 30, 2001, after which it granted Appellees' summary judgment motion in full. n7 Peters timely

[*314] appealed and challenges only the district court's dismissal of her Title VI and *First Amendment* retaliation claims.

> n7 The district court's reasoning for its decision was not embodied in a written opinion but was simply stated from the bench.

II.

We review the entry of summary judgment in favor of Appellees de novo. *American Legion Post 7 v. City of Durham, 239 F.3d 601, 605 (4th Cir. 2001)*. Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact . . . ." *Fed. R. Civ. P. 56(c)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. In deciding whether there is a genuine [**13] issue of material fact, "the evidence of the nonmoving party is to be believed and all justifiable inferences must be drawn in its favor." *Durham, 239 F.3d at 605*. A mere scintilla of proof, however, will not suffice to prevent summary judgment; the question is "not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party" resisting summary judgment. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)* (internal quotation marks omitted). A failure to produce evidence sufficient to permit a jury to find for the nonmovant plaintiff as to one of the elements of his cause of action renders all other issues of fact immaterial. *Celotex, 477 U.S. at 323*.

A.

The district court granted summary judgment for Appellees as to Peters's Title VI retaliation claims on the ground that after *Alexander v. Sandoval, 532 U.S. 275, 149 L. Ed. 2d 517, 121 S. Ct. 1511 (2001)*, no private cause of action exists for retaliation either under Title VI or its implementing regulations. We will proceed by stating the relevant [**14] statutory and regulatory provisions and will then analyze the impact of *Sandoval* on the availability of a cause of action for Title VI retaliation.

Section 601 of Title VI of the Civil Rights Act of 1964 provides that:

> No person in the United States shall, on the ground of race, color or national origin, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C.A. § 2000d.

Section 602 of the Act provides that:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the pro visions of *section 2000d* of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability . . . .

42 U.S.C.A. § 2000d-1.

The Department of Education has promulgated a regulation, 34 C.F.R. Part 100, which provides:

> (e) *Intimidatory or retaliatory acts prohibited.* No recipient or other person shall intimidate, threaten, coerce, [**15] or discrim inate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act *or this part*, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part.

34 C.F.R. § 100.7(e) (second emphasis added).

The Department of Education's Title VI regulations, which establish rights under "this part" for purposes of *34 C.F.R. § 100.7(e)*,

[*315] forbid intentional discrimination, as well as practices that have a disparate impact, but are not intentionally discriminatory. *34 C.F.R. § 100.3*. The regulations further require "affirmative action to overcome the effects of prior discrimination," *34 C.F.R. § 100.3(b)(6)(i)*, and permit affirmative action "even in the absence of such prior discrimination," *34 C.F.R. § 100.3(b)(6)(ii)*.

B.

It is well-settled that there is an implied private right of action to enforce *§ 601*'s core prohibition of discrimination in federally financed programs. *Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 610-611, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983)*; [**16] *cf. Cannon v. Univ. of Chicago, 441 U.S. 677, 699, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979)* (addressing Title IX, and suggesting that a private right of action exists with respect to Title VI). It is equally clear that *§ 601* prohibits only intentional discrimination, not "disparate impact" practices. *Alexander v. Sandoval, 532 U.S. 275, 280, 149 L. Ed. 2d 517, 121 S. Ct. 1511 (2001)*; *cf. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287, 57 L. Ed. 2d 750, 98 S. Ct. 2733* (*§ 601* "proscribes only those racial classifications that would violate the *Equal Protection Clause or the Fifth Amendment*") (opinion of Powell, J.).

In *Sandoval*, the Court addressed the question of whether assumedly valid *§ 602* regulations that forbid disparate impact practices n8 are enforceable via an implied private right of action. *Sandoval, 532 U.S. at 282*. The Court held that they are not, because Congress must authorize causes of action; "agencies may play the sorcerer's apprentice," specifying to some degree the content of rights conferred by statute, but may not act as "the sorcerer himself," creating causes of action not established [**17] by Congress. *Id. 438 U.S. at 291*. On the other hand, the *Sandoval* Court held that "regulations applying *§ 601*'s ban on intentional discrimination," if valid and reasonable under the standard of *Chevron USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)*, are enforceable in a private action. *Sandoval, 532 U.S. at 284*. The Court elaborated:

> We do not doubt that regulations applying *§ 601*'s ban on intentional discrimination are covered by the cause of action to enforce that section. Such regulations, if valid and reason able, authoritatively construe the statute itself, *see NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257, 115 S. Ct. 810, 130 L. Ed. 2d 740 (1995)*; *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)*, and it is therefore meaningless to talk about a sepa rate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative [**18] interpretation of the statute to be so enforced as well.
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> *Sandoval, 532 U.S. at 284*.

> n8 The Supreme Court has assumed without deciding that a regulation could be valid under *§ 602* (as a "means of effectuating" Title VI) without being a valid interpretation of *§ 601*, which prohibits only intentional discrimination. *Sandoval, 532 U.S. at 282*.

Under the familiar *Chevron* standard, "when it appears that Congress delegated authority to an agency generally to make rules carrying the force of law, we give great deference to an administrative implementation of the particular statutory

[*316] provision." *McDaniels v. United States, 300 F.3d 407, 411 (4th Cir. 2002)* (internal quotation marks and alterations omitted). In applying the *Chevron* standard, "we inquire first whether the intent of Congress is clear as to the precise question at issue . . . . If so, that is the end of the matter." *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257, 130 L. Ed. 2d 740, 115 S. Ct. 810 (1995)* [**19] (internal quotation marks and citations omitted). If, however,

> the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment controlling weight.

Id. (internal quotation marks and citations omitted).

To determine whether there is a private cause of action for retaliation under Title VI, we must resolve the question of whether *34 C.F.R. § 100.7(e)*'s retaliation prohibition is an interpretation of § 601's core antidiscrimination mandate. If *§ 100.7(e)* is an interpretation of § 601 that is valid under *Chevron*, it commands deference and may be enforced via an implied private right of action. If instead, *§ 100.7(e)* is a regulation which, even if valid as a § 602 "means of effectuating" Title VI, nonetheless "forbid [s] conduct that § 601 permits," *Sandoval, 532 U.S. at 285*, namely conduct other than intentional discrimination, [**20] the regulation may not be enforced via an implied private right of action. n9

> n9 To the extent that Peters cannot show an implied right of action to enforce the retaliation regulations, *§ 1983* does not provide Peters with a cause of action. "An administrative regulation . . cannot create an enforceable *§ 1983* interest not already implicit in the enforcing statute." *Smith v. Kirk, 821 F.2d 980, 984 (4th Cir. 1987)*. Relying partially on *Smith*, the Third Circuit has recently rejected the claim that disparate impact regulations promulgated under *§ 602 of Title VI* are enforceable via *§ 1983. South Camden Citizens in Action v. New Jersey Dep't of Envtl. Prot., 274 F.3d 771, 790 (3d Cir. 2001)* (stating that disparate impact regulations are "too far removed from Congressional intent to constitute a 'federal right' enforceable under *§ 1983*" (internal citation omitted)); *see also Kissimmee River Valley Sportsman Ass'n v. City of Lakeland, 250 F.3d 1324, 1327 (11th Cir. 2001)* (holding that regulations which, even if valid, impose new and distinct obligations not found in the statute itself, are not enforceable via *§ 1983*).

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C.

Appellees argue that *§ 601* does not forbid retaliation and that the prohibition on retaliation therefore arises solely from agency regulations that are, after *Sandoval*, unenforceable via an implied private right of action. In support of this proposition, Appellees cite *Preston v. Virginia ex rel. New River Community College, 31 F.3d 203 (4th Cir. 1994)*, in which we held that *34 C.F.R. § 100.7(e)* prohibits retaliation. *Id. at 206 n.2*. Reliance on *Preston* is, however, misplaced; it does not follow from our observation that *§ 100.7(e)* prohibits retaliation that this prohibition is unenforceable in a private action. *Section 100.7(e)* is enforceable in a private action if it is a "regulation[] applying § 601's ban on intentional discrimination," *Sandoval, 532 U.S. at 284*, and nothing in *Preston* suggests that it is not such a regulation.

Further, the failure of *§ 601* to include a specific prohibition on retaliation apart from its general prohibition of racial discrimination cannot, in light of relevant

[*317] precedent interpreting similarly worded antidiscrimination statutes, lead to an inference [**22] that Congress did not mean to prohibit retaliation in *§ 601*, or that those who oppose intentional discrimination violative of *§ 601* are not within the class for whose benefit Congress enacted that provision. In *Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 24 L. Ed. 2d 386, 90 S. Ct. 400 (1969)*, the Supreme Court, interpreting *42 U.S.C.A. § 1982*'s grant to all citizens of the same rights to transact in property "as is enjoyed by white citizens," held that a white man who was expelled from a neighborhood board for attempting to sell property to a black man could maintain an action under *§ 1982. Id. at 236. Section 1982*, like *§ 601 of Title VI*, contains no explicit retaliation provision. The *Sullivan* Court noted that the white plaintiff was expelled "for the advocacy of [a black man's] cause . . . . If that sanction, backed by a state court judgment, can be imposed, then [the plaintiff] is punished for trying to vindicate the rights of minorities protected by *§ 1982* . . . . There can be no question but that [the plaintiff]" may maintain an action under *§ 1982. Id. Sullivan* thus stands for the proposition [**23] that a prohibition on discrimination should be judicially construed to include an implicit prohibition on retaliation against those who oppose the prohibited discrimination. Additionally, we have held that retaliation is a viable theory under *42 U.S.C.A. § 1981*, which, similarly to *§ 601 of Title VI*, prohibits only intentional discrimination and makes no separate reference to retaliation. *See Fiedler v. Marumsco Christian Sch., 631 F.2d 1144, 1149 n.7 (4th Cir. 1980)*; *see also Johnson v. Univ. of Cincinnati, 215 F.3d 561, 576 (6th Cir. 2000)* (holding, based on *Sullivan*, that retaliation is a viable theory under *§ 1981*).

Our good colleague's dissent argues that, under the approach to analyzing implied private rights of action embodied in *Cannon v. University of Chicago, 441 U.S. 677, 688, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979)*, Peters's claim fails because she is not a member of the class for whose benefit Congress enacted *§ 601. Post*, at 23-24. Thus, the dissent argues, even if *§ 601* contains an implicit retaliation prohibition, no private right of action is available to Peters. The difficulty [**24] with this argument is that both *Sullivan* and *Fiedler* expressly held, not only that the analogous language of *§§ 1981 and 1982* forbids retaliation for opposing the practices that those provisions prohibit, but also that a private right of action is available to those who engage in protected opposition under *§§ 1981 and 1982. See Sullivan, 396 U.S. at 237* (holding that "there can be no question" that a white plaintiff subjected to adverse action for attempting to sell property to a black man may "maintain this action" under *§ 1982*); *Fiedler, 631 F.2d at 1149* (white student plaintiffs injured because of association with black students have statutory standing to sue under *§ 1981*). The dissent's precise mode of reasoning would mandate a different result in both cases, effectively disturbing settled precedent.

Moreover, the *Sullivan* line of authority has found broad and continuing acceptance, in this court and others, long after *Cannon* was decided. *See Murrell v. Ocean Mecca Motel, Inc., 262 F.3d 253, 258 (4th Cir. 2001)* (following *Fiedler*; holding that a white motel customer evicted due to association with black customers [**25] may maintain a private action under *§ 1981*); *Johnson, 215 F.3d 561, 576 (6th Cir. 2000)* (white plaintiff allegedly retaliated against for opposing discrimination may bring suit under *§ 1981*); *Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262, 1266-67 (10th Cir. 1989)* (plaintiff, a white attorney, who was allegedly subjected to adverse

[*318] action because of his representation of black clients, may maintain action under *§ 1981* if he can show that he was deprived of an interest protected by *§ 1981*); *Skinner v. Total Petroleum, Inc., 859 F.2d 1439, 1447 (10th Cir. 1988)* (white employee allegedly terminated for assisting a black employee could maintain an action under *§ 1981*).

Section 1981, like *§ 601*, "only proscribes purposeful discrimination." *Murrell, 262 F.2d at 257*. Neither *§ 601*, nor *§§ 1981 or 1982*, contains an explicit retaliation provision. Yet, as a matter of substance, a matter of standing, and a matter of the availability of a private right of action, myriad courts, before and after *Cannon*, have held that the general prohibitions on intentional discrimination embodied in *§§ 1981 and 1982* extend to provide [**26] a cause of action to those who can demonstrate that they have been purposefully injured due to their opposition to intentional racial discrimination. The question thus reduces to whether we can reverse, under *Chevron*'s deferential mandate, an agency construction that is materially identical to the approach taken over a period of decades by the Supreme Court, this court, and numerous other courts, *without* the benefit of *Chevron* deference, in construing provisions that are indistinguishable from *§ 601* in relevant respects. In particular, an examination of this court's decisions in *Fiedler* and *Murrell* convinces us that maintaining the coherence and analytical consistency of our precedent requires that we answer this question in the negative. n10

n10 We note that the Eleventh Circuit's opinion in *Jackson v. Birmingham Bd. of Educ., 309 F.3d 1333 (11th Cir. 2002)*, did not consider the impact of *Sullivan* and its progeny on the question that we decide today.

In light of [**27] the lengthy line of authority discussed above, we conclude that an agency quite reasonably could construe § 601 to forbid purposeful retaliation based upon opposition to practices made unlawful by § 601. For example, an agency could reason that such retaliation serves as a means of implementing or actually engaging in intentional discrimination by encouraging such discrimination and removing or punishing those who oppose it or refuse to engage in it. Clearly, a practice such as expelling any student who speaks against an officially sanctioned and explicit exclusion of a particular racial group from a school program, or terminating a teacher who refuses to give lower grades to some students on the basis of race, would violate § 601 on a *Chevron*-permissible construction of that provision. Further, it is neither inconsistent with the text of § 601 nor an unreasonable construction of that section for an agency to construe it to cover those who are purposefully injured for opposing the intentional discrimination Congress made unlawful via § 601. In this connection, we note that the regulation in question expressly addresses intimidatory, coercive, or discriminatory conduct engaged [**28] in "*for the purpose of* interfering with any right or privilege secured by Section 601" of Title VI. *34 C.F.R. § 100.7(e)* (emphasis added). The regulation thus targets retaliatory action actually intended to bring about a violation of *§ 601*'s core prohibition on intentional racial discrimination. Retaliation of this sort bears such a symbiotic and inseparable relationship to intentional racial discrimination that an agency could reasonably conclude that Congress meant to prohibit both, and to provide a remedy for victims of either. Thus, Appellees' contention that no retaliation of any kind is prohibited by Title VI is untenable. To accept such a contention, we would have to reverse under the *Chevron* standard an agency construction

[*319] of *§ 601* that is, in effect, the same one developed by the Supreme Court in *Sullivan* in construing the similar provisions of *§ 1982* and embraced by this and other courts in construing *§ 1981*. This we cannot do.

D.

Having determined that *34 C.F.R. § 100.7(e)*'s retaliation prohibition is, at least to some extent, a valid interpretation of § 601 that is enforceable via § 601's implied private [**29] right of action, the question remains of the scope and contours of any privately enforceable retaliation prohibition. The answer must turn on which portion of *§ 100.7(e)* one examines. The regulation's prohibition on retaliation "for the purpose of interfering with any right or privilege *secured by section 601 of the Act*" is, for the reasons we have discussed above, a valid interpretation of § 601 and is enforceable via an implied private right of action. *34 C.F.R. § 100.7(e)* (emphasis added). On the other hand, the regulation's prohibition on retaliation "for the purpose of interfering with any right or privilege *secured by . . . this part*" encompasses every right or privilege created by Part 100. *Id.* (emphasis added). Part 100 rights include the right to be free of unintentional disparate impact practices. It is clear after *Sandoval* that Congress, in enacting *§ 601*, did not forbid unintentional disparate impact practices but merely forbade intentional discrimination. Only the prohibition of intentional discrimination, as validly construed by regulations, is enforceable via a private right of action. It cannot be that a valid interpretation [**30] of *§ 601* protects opposition to practices that are clearly outside *§ 601*'s ambit. Thus, the correct inquiry is whether the practices which Peters opposed constituted intentional discrimination forbidden by *§ 601*. n11 Stated another way, *§ 601*'s implicit prohibition on retaliation is congruent with and limited by, *§ 601*'s basic prohibition on intentional discrimination. Thus, the retaliation regulations are enforceable via an implied private right of action to the extent that they forbid retaliation for opposing practices that one reasonably believes n12 are made unlawful by *§ 601*. n13 Insofar as they forbid retaliation for opposing disparate impact practices not actionable under *§ 601*, the regulations may not be enforced either via the *§ 601* private right of action or *§ 1983*.

n11 Peters contends that retaliation is inherently intentional in nature, that all retaliation is intentional discrimination, and thus, that *Sandoval* is of no moment in this case. We note, however, that "retaliation" exists conceptually only by reference to the acts which form the basis for it. Terminating an employee because she opposes practices which have nothing to do with Title VI is not Title VI retaliation. *See 34 C.F.R. § 100.7(e)* ("No recipient . . . shall . . . discriminate against any individual for the purpose of interfering with any right or privilege *secured by section 601 of the Act* . . . ." (emphasis added)).

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n12 *See* pp. 18-19 *infra* for our discussion of the reasonable belief standard.

n13 Our conclusion in this respect accords with the position urged by the United States as *amicus curiae*, whose participation in this appeal has been helpful to the court. The United States limited its argument to the availability of a retaliation cause of action under Title VI and expressed no opinion regarding the availability of a cause of action via *§ 1983* or regarding Peters's *First Amendment* claims.

E.

Before the district court, Appellees argued only one ground — the total unavailability of a cause of action for Title VI retaliation — in support of summary judgment as to Peters's Title VI retaliation claim. The district court did not address (and Appellees did not ask it to address)

[*320] whether Peters succeeded in creating a genuine issue of fact as to whether she reasonably believed the school district to be engaged in intentional discrimination that would violate Title VI. n14

> n14 This state of affairs does not impair our ability to articulate the law governing Title VI retaliation claims; "when an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Financial Servs., 500 U.S. 90, 99, 114 L. Ed. 2d 152, 111 S. Ct. 1711 (1991)*. Thus, given that the issue of the availability of a private right of action for Title VI retaliation is properly before us, we have the authority to determine the contours of any cause of action that is available. *See Forshey v. Principi, 284 F.3d 1335, 1357 (Fed. Cir. 2002)* (en banc) (applying the *Kamen* framework, and stating by way of example that if one party argues that a beyond a reasonable doubt standard of proof is applicable to an issue and the other party argues that a preponderance of the evidence standard is applicable, the Court of Appeals may hold that an (intermediate) clear and convincing evidence standard applies).

[**32]

At oral argument, Appellees denied that the record in this case could support any inference that the practices opposed by Peters constituted intentional discrimination. If correct, this conclusion would be fatal to Peters's Title VI retaliation claim. While we may affirm summary judgment on alternate grounds and may articulate the law governing a claim properly before us in a manner different from that urged by the parties, we will not ordinarily affirm summary judgment on grounds raised by an appellee for the first time on appeal, "where the parties were not afforded an opportunity to develop the issue below . . . so that the party was not on notice of the need to meet it . . . ." *FDIC v. Lee, 130 F.3d 1139, 1142 (5th Cir. 1997)*. Fairness demands that a party be given an appropriate opportunity to present evidence on each aspect of her claim before suffering an adverse entry of summary judgment. Thus, because it is possible that Peters can develop additional evidence supporting the conclusion that she reasonably believed the school district to have been engaged in intentional discrimination, we will remand for such additional discovery as may be warranted.

In order [**33] to assist the district court on remand, we will briefly review the elements of a Title VI retaliation claim. To make a claim for Title VI retaliation, Peters must show (1) that she engaged in protected activity; (2) that Appellees took a material adverse employment action against her, and (3) that a causal connection existed between the protected activity and the adverse action. n15 *Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985), overruled on other grounds by Price Waterhouse v. Hopkins, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989)* (addressing Title VII retaliation). As in other civil rights contexts, to show "protected activity," the plaintiff in a Title VI retaliation case need "only . . . prove that he opposed an unlawful employment practice which he reasonably believed had occurred or was occurring." n16 *Bigge v. Albertsons,*

[*321] *Inc., 894 F.2d 1497, 1503 (11th Cir. 1990)*; *see also Ross, 759 F.3d at 355 n.1* (stating that a Title VII oppositional retaliation claimant need not show that the underlying claim of discrimination was in fact meritorious in order to prevail). n17 The inquiry [**34] is therefore (1) whether Peters "*subjectively* (that is, in good faith) believed" that the district had engaged in a practice violative of *§ 601*, and (2) whether this belief "was *objectively* reasonable in light of the facts," n18 a standard which we will refer to as one of "reasonable belief." *Weeks v. Harden Mfg. Corp., 291 F.3d 1307, 1312 (11th Cir. 2002).*

n15 Retaliation may be proved either via direct evidence or the burdenshifting scheme of *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973).* The difference, however, between direct evidence and *McDonnell Douglas* proof in the retaliation context pertains to the third, causalconnection, prong of a retaliation claim, which may be proved circumstantially in the *McDonnell Douglas* context. *Bigge v. Albertsons, Inc., 894 F.2d 1497, 1503 (11th Cir. 1990).*

n16 Oppositional activities are not protected unless they are proportionate and reasonable under the circumstances; courts must balance the purpose of protecting opposition to discrimination against Congress's "manifest desire not to tie the hands of employers in the objective selection and control of personnel." *Laughlin v. Metro. Washington Airports Auth., 149 F.3d 253, 259 (4th Cir. 1998)* (addressing Title VII retaliation) (internal citation omitted).

[**35]

n17 In contrast to Title VI, the *Fourteenth Amendment's Equal Protection Clause*, and the equal protection component of the *Fifth Amendment*, Title VII prohibits practices that are not intentionally discriminatory but that have a disparate impact on members of a particular racial group. *Griggs v. Duke Power Co., 401 U.S. 424, 432, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971)* (stating that, under Title VII, the "absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability").

n18 While proof of a disparate impact, in combination with other "circumstantial and direct evidence of intent," *Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 266, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977)*, can sometimes support an inference of intentional discrimination, a jury issue on intentional discrimination is not created *ipso facto* by pointing to a policy's disparate effects. *Gen. Building Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 396, 73 L. Ed. 2d 835, 102 S. Ct. 3141 (1982)* (stating that "it would be anomalous to hold that *§ 1981* could be violated only by intentional discrimination and then to find this requirement satisfied by proof" of disparate impact); *see also Reno v. Bossier Parish School Bd., 520 U.S. 471, 487, 137 L. Ed. 2d 730, 117 S. Ct. 1491 (1997)* (noting that the impact of an official action is sometimes probative, along with other evidence, of the intent behind the action). A facially neutral policy "does not violate [Title VI] solely because of its disproportionate effects." *Pryor v. NCAA, 288 F.3d 548, 562 (3d Cir. 2002)* (quoting *Stehney v. Perry, 101 F.3d 925, 937 (3d Cir. 1996)).* Indeed, "to prove intentional discrimination by a facially neutral policy, a plaintiff must show that the relevant decisionmaker . . . adopted the policy at issue 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* (quoting *Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979)).* Deliberate indifference to a policy's disparate impacts, as opposed to the purposeful pursuit of those impacts, is not a viable theory under Title VI. *Id. 288 F.3d at 567.*

[**36]

III.

The district court also granted summary judgment to Appellees on Peters's *First Amendment* retaliation claim, which she pleaded as an assertion that Appellees "retaliated against her because of her advocacy for a racially equitable gifted program" in violation of *42 U.S.C.A. § 1983* and the *Fourteenth Amendment.* (J.A. at 12.) The district court held that Peters's complaint made no reference to the *First Amendment* and thus did not properly plead a *First Amendment* claim, and that even if the issue had been properly pleaded, Peters did not create a genuine issue of fact regarding the causal link between any protected expression and adverse employment action.

At the outset, it is clear that the *First Amendment* claim was properly pleaded. *See McKinley v. Kaplan, 177 F.3d 1253, 1257 (11th Cir. 1999)* (noting that no heightened requirements of pleading particularity apply to *First Amendment* claims brought via *42 U.S.C.A. § 1983*). Peters alleged in her complaint that she was terminated because of her

[*322] advocacy of changes to the gifted program, in violation of the *Fourteenth Amendment.* To the extent that this method of pleading [**37] created ambiguity as between a procedural due process or equal protection claim and a *First Amendment* claim, the facts alleged as the basis for the claim would make it clear that the claim arose under the *First Amendment* as incorporated by the *Fourteenth Amendment. See Krieger v. Fadely, 341 U.S. App. D.C. 163, 211 F.3d 134, 137 (D.C. Cir. 2000)* (noting that complaints need not "plead law or match facts to every element of a legal theory" (internal quotation marks omitted)). In this connection, we note that Appellees fully addressed the *First Amendment* claim on the merits in their summary judgment submissions. While less than crystalline, Peters's brief in opposition to summary judgment characterized her claim as involving a violation of the right "to be free from unlawful discrimination as guaranteed by the First and *Fourteenth Amendments.*" (J.A. at 252). At oral argument on Appellees' summary judgment motion, Peters characterized her claim as "in the nature of a free speech argument." (J.A. at 1217). The district court then asked Peters why she didn't "brief the free speech issue then, or at least make it clearer than you did." (J.A. at 1217). Peters's counsel responded [**38] that a basis for Peters's claim in Count Two was that "the *First Amendment* gives her the right to speak out against illegal discrimination." (J.A. at 1217–1218). After an additional colloquy, the district court asked Peters's counsel to elaborate further on "your *First Amendment* claim . . . what's the causal relationship between her deprivation of her *First Amendment* rights and the benefit that she lost?" (J.A. at 1227–28). Peters's counsel responded that "she has the right under the *First Amendment* to advo cate for racial equity in the program . . . and so the causal connection is that because of her advocacy of nondiscrimination. . . they nonrenewed her." (J.A. at 1228). And, as we have noted, the district court ruled on the merits of Peters's *First Amendment* claim. (J.A. at 1243.)

In short, then, Peters fully, if inartfully, pleaded the factual predicate for her *First Amendment* claim; Appellees addressed it as such in their summary judgment submissions; Peters characterized her claim as arising under the *First Amendment* in responding to those submissions; the merits of the *First Amendment* claim were rather extensively explored at oral argument on summary judgment; and the district [**39] court ruled on the *First Amendment* claim on the merits. Accordingly, both Appellees and the district court were on adequate notice of Peters's *First Amendment* claim, and we do not believe that she waived such a claim. *See, e.g., Swierkiewicz v. Sorema N.A., 534 U.S. 506, 122 S. Ct. 992, 997–98, 152 L. Ed. 2d 1 (2002)* (noting that under the notice pleading regime embodied in *Fed. R. Civ. P. 8(a)(2)*, highly technical requirements of pleading specificity are disfavored); *Conley v. Gibson, 355 U.S. 41, 48, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)* (stating that courts must "reject the approach that pleading is a game of skill in which one mis-step by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits").

To prevail on her *First Amendment* retaliation claim, Peters must show (1) that she engaged in protected expression regarding a matter of public concern; (2) that her interest in *First Amendment* expression outweighs her employer's interest in efficient operation of the workplace; (3) that she was deprived of some valuable benefit; and (4) that a causal relationship exists between her protected expression [**40] on matters of public concern and the loss of the benefit. *Goldstein*

[*323] *v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 351-52 (4th Cir. 2000)*; *Huang v. Board of Governors of the Univ. of N.C., 902 F.2d 1134, 1140 (4th Cir. 1990)*. The "causal relationship" inquiry focuses on whether Peters's contract would have been renewed"'but for' her protected speech" and "involves two steps . . . . In the first step, the employee bears the burden of establishing the requisite causation to prove that the protected speech was a motivating factor or played a substantial role" in inducing the adverse action. *Hall v. Marion Sch. Dist. No. 2, 31 F.3d 183, 193 (4th Cir. 1994)*. "If the employee is able to prove such, the second step shifts the burden to the employer to put forward evidence that it would have [taken adverse action] even in the absence of the protected speech." *Id.*

Appellees do not challenge on appeal Peters's ability to satisfy the first three elements of a *First Amendment* retaliation claim. Instead, they contend only that Peters cannot show the necessary causal connection between any protected expression and the non-renewal of [**41] her contract. On this record, a reasonable finder of fact could conclude, however, that Peters's advocacy of various policy changes to the gifted program was the but-for cause of her termination. n19 For example, a reasonable finder of fact could credit Peters's allegations of extensive policy differences with her superiors in combination with Jenney's complaints to Peters, which were reiterated in the very letter by which Jenney recommended Peters's dismissal, that she was fomenting "unrest in the gifted community." (J.A. at 171.) Indeed, Peters's "inappropriate communications with parents, principals, teachers and media" were among Jenney's specifically enumerated reasons for recommending Peters's termination. (J.A. at 172.) Of course, evidence also abounds as to the possible performance-related reasons for the nonrenewal of Peters's contract, but a reasonable finder of fact could conclude, when confronted with this conflicting evidence, that whatever performance inadequacies might have been present, Peters ultimately was not offered a renewed contract because of her advocacy, within and outside the school district, of changes to the gifted program. Thus, the district court's grounds [**42] for entering summary judgment against Peters on her *First Amendment* retaliation claim are not viable. n20 Accordingly, we vacate the district court's grant of summary judgment in favor of Appellees on Peters's *First Amendment* retaliation claim.

n19 We note that a broader universe of advocacy is relevant to Peters's *First Amendment* retaliation claim than to her Title VI retaliation claim, because the category of speech on a matter of public concern is broader than the category of opposition to practices reasonably believed to be violative of Title VI.

n20 Appellees did not contend, in their motion for summary judgment below, that Peters is a "policymaker" under the rationale of *Elrod v. Burns, 427 U.S. 347, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976)*, and *Branti v. Finkel, 445 U.S. 507, 63 L. Ed. 2d 574, 100 S. Ct. 1287 (1980)*.

IV.

The Department of Education has construed *§ 601 of Title VI to* forbid retaliation, and to the extent that this prohibition has as its predicate [**43] opposition to practices forbidden by *§ 601*, it is a reasonable interpretation of *§ 601* itself, which is enforceable via a private right of action. Nonetheless, a plaintiff bringing a Title VI retaliation claim must show that she believed, in good faith and with objective reasonableness, that she was opposing intentional discrimination of the sort that *§ 601* forbids. We therefore vacate the

[*324] district court's entry of summary judgment dismissing Peters's Title VI retaliation claim and remand to allow the parties to address the nature of the practices which Peters opposed, as well as the other aspects of her claim. We vacate the district court's entry of summary judgment in favor of Appellees on Peters's *First Amendment* retaliation claim because that claim was adequately pleaded and sufficient evidence existed to survive summary judgment regarding the necessary causal connection between Peters's advocacy and the nonrenewal of her contract, and remand for such additional proceedings as may be necessary on Peters's *First Amendment* claim.

VACATED AND REMANDED

DISSENTBY: WIDENER

DISSENT: WIDENER, Circuit Judge, dissenting:

I respectfully dissent. I do not believe that Title VI creates [**44] a private right of action for persons who are not direct victims of discrimination so I would affirm the district court's order granting summary judgment to defendants on plaintiff's Title VI claim. Furthermore, as I do not believe that plaintiff properly presented a *First Amendment* claim, I would affirm the district court's dismissal of count two of the complaint.

I.

For Dr. Peters to successfully prosecute a claim of retaliation under section 601 of Title VI, *42 U.S.C. § 2000d*, the court must answer three questions in the affirmative: 1) Was plaintiff retaliated against for complaining of intentional discrimination, rather than disparate impact discrimination; 2) Are retaliation claims included within *section 601*'s prohibition against intentional discrimination; and 3) Is plaintiff a member of the class of persons Congress sought to protect in enacting *section 601*? While I think insufficient the majority's reliance on an "implicit" prohibition to find a private right of action for retaliation under *section 601*, I note that it is not necessarily required to decide whether *section 601* prohibits retaliation, for the judgment of the district court may be affirmed [**45] on the ground that Dr. Peters, as a person who was not a direct victim of discrimination, is not within the class of persons Congress sought to protect in enacting Title VI.

Sandoval directs that for a private right of action for retaliation to exist it must be found in a statute created by Congress. *Alexander v. Sandoval, 532 U.S. 275, 286, 149 L. Ed. 2d 517, 121 S. Ct. 1511 (2001)*. While Title VI does not create any explicit private rights of action, *Guardians Ass'n v. Civil Service Comm'n, 463 U.S. 582, 600, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983)*, the Supreme Court has interpreted *section 601* to prohibit intentional discrimination. See *Alexander v. Sandoval, 532 U.S. 275, 280, 149 L. Ed. 2d 517, 121 S. Ct. 1511 (2001)* ("It is . . . beyond dispute . . . that *§ 601* prohibits only intentional discrimination."); *Alexander v. Choate, 469 U.S. 287, 293, 83 L. Ed. 2d 661, 105 S. Ct. 712 (1985)* ("Title VI itself directly reaches only instances of intentional discrimination."). Although *section 601*'s prohibition on intentional discrimination is enforceable through a private right of action, private rights of action [**46] are limited to the special class of persons Congress sought to benefit. *Cannon v. University of Chicago, 441 U.S. 677, 688, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979)* (stating "fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person"); see also *Regional Mgmt. Corp v. Legal Servs. Corp., 186 F.3d 457, 463 (4th Cir. 1999)*. Thus, not only must plaintiff prove that *section 601* prohibits retaliation, but she must also show that she is "one of the class for whose especial benefit" Title VI was enacted. *Texas & Pac. Ry. Co. v. Rigsby,*

[*325] *241 U.S. 33, 39, 60 L. Ed. 874, 36 S. Ct. 482 (1916)*; see also *Gonzaga University v. Doe, 536 U.S. 273, 153 L. Ed. 2d 309, 322, 122 S. Ct. 2268 (2002)* (citing *Cannon* for the proposition that a statute is privately enforceable under implied right "only where Congress explicitly conferred a right directly on a class of persons that included the plaintiff in the case").

The court's duty is to "interpret the statute Congress has passed to determine whether it displays an intent to create not just [**47] a private right but also a private remedy" for this particular plaintiff. See *Sandoval, 532 U.S. at 286*. To determine whether a private right of action for Dr. Peters exists under Title VI, we should look to the language of the statute for "statutory intent is determinative." *Sandoval, 532 U.S. at 286. Section 601* states "no person . . . shall on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under" a program receiving federal funding. *42 U.S.C. § 2000d*. The plain language of *section 601* is limited to those persons who have been "excluded for participating in, been denied the benefits of, or been subjected to discrimination" on the basis of race, color, or national origin by a federally funded program. *42 U.S.C. § 2000d*. Dr. Peters—as a third party who alleges that she has complained about discrimination against others, but does not allege that she is a victim of discrimination—is not within the class of persons Congress sought to protect in enacting Title VI.

The Eleventh Circuit recently reached a similar [**48] conclusion in examining section 901 of Title IX, a statute containing language identical to *section 601* of Title VI in describing the persons Congress sought to protect. See *Jackson v. Birmingham Bd. of Educ., 309 F.3d 1333 (11th Cir. 2002)*; see also *Cannon, 441 U.S. at 694-95*. ("Title IX was patterned after Title VI . . . . Except for the substitution of the word 'sex' in Title IX to replace the words 'race, color, or national origin' in Title VI, the two statutes use identical language to describe the benefited class."). In *Jackson*, a high school coach of a girls' basketball team sued a local board of education alleging that the board retaliated against the coach by removing him from his coaching position after he complained of the school's different treatment of male and female athletic teams. *Jackson, 309 F.3d at 1335*. In determining that the high school coach did not have a private right of action for retaliation, the Eleventh Circuit concluded that "review of both the text and structure of Title IX yields no congressional intent to create a cause of action for retaliation, particularly for a plaintiff who is not a direct [**49] victim of gender discrimination." *Jackson, 309 F.3d at 1348*.

Had Congress intended to extend a private right of action under Title VI to persons other than victims of discrimination it knew how to do so. *Title VII of the Civil Rights Act of 1964* contains an antiretaliation section expressly prohibiting an employer from retaliating against "any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing." *42 U.S.C. § 2000e-3(a)*. Unlike Title VII, Title VI contains no indication that Congress intended to protect persons who complained of, but were not the victims of, the discrimination prohibited by the statute. Quite simply, the language of *section 601* only protects actual victims of race, color, and national origin discrimination. As I do not believe that plaintiff is among the class of persons Congress sought to protect

[*326] in enacting Title VI, I would affirm the district court's judgment in favor of the defendants on the Title VI claim.

The Eleventh [**50] Circuit, in *Jackson*, alternately held that a private right of action for retaliation does not exist under Title IX based on *Sandoval*. See *Jackson, 309 F.3d at 1344*. Because this holding is a matter of statutory construction rather than a Constitutional question, such holding is entitled to equal dignity with the holding that the plaintiff, Jackson, was not within the class meant to be protected by Title IX. I depend on both aspects of *Jackson* for my disagreement with the majority. As *Sandoval* points out, *532 U.S. at 286* (quoting *Federal Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 173, 128 L. Ed. 2d 119, 114 S. Ct. 1439 (1994))*, a "'private plaintiff may not bring a [suit based on a regulation] against a defendant for acts not prohibited by the text of [the statute].'" Statutory intent is determinative in determining whether a private remedy exists. "Without it, a cause of action does not exist and the courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute . . . . [citations omitted] 'Raising up causes of action where [**51] a statute has not created them may be a proper function for common law courts, but not for federal tribunals.'" *Sandoval, 532 U.S. at 286-87*.

As was the *Jackson* plaintiff, a coach of a girls' basketball team who complained about a school board which he alleged had discriminated under Title IX against girls' athletics, the plaintiff in this case, Dr. Peters, is at least twice removed from the class of people sought to be protected by the statute. Thus, there is no intent of Congress to protect her against retaliation, as there was no intent of Congress so to protect Coach Jackson.

IJackson was a Title IX case, while *Sandoval*, as is the case at hand, was a Title VI case. On the authority of *Cannon, 441 U.S. at 694-95*, the *Jackson* court read Titles VI and IX *in pari materia* as do I. See *Jackson, 309 F.3d at 1339*. On that account, the holding in *Jackson*, that there is no cause of action for retaliation, is, for all practical purposes, the holding of a sister circuit on the same question, contrary to the decision of the majority in this case.

II.

As to plaintiff's *First Amendment* claim, I cannot agree with the [**52] majority that plaintiff properly presented a *first amendment* claim because it is not the responsibility of the district court or this court to create a claim that counsel for plaintiff failed to spell out in her pleadings, briefs, or argument to the district court. See *Clark v. National Travelers Life Ins., 518 F.2d 1167 (6th Cir. 1975)*.

While the theory of notice pleadings directs that "counsel's failure to perceive the true basis of the claim" is not fatal at the pleading stage, 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1219 (2d ed. 1990), by the time a case reaches the summary judgment stage, the legal basis for plaintiff's claims should be reasonably apparent in the briefs and arguments presented by counsel. See generally *Edwards v. City of Goldsboro, 178 F.3d 231, 241 n. 6 (4th Cir. 1999)* (noting that issues not briefed or argued on appeal are deemed abandoned). We review district court decisions "in light of what was, in fact, before it[,]" and should not permit, even in *pro se* cases, which this is not, "fleeting references to preserve questions on appeal" or require "district courts to anticipate [**53] all arguments

[*327] that clever counsel may present in some appellate future." *Beaudett v. City of Hampton, 775 F.2d 1274, 1278 (4th Cir. 1985)*.

Count two alleges that under *42 U.S.C. § 1983*, defendants "violated the Constitutional rights of Peters when they retaliated against her for promoting a racially equitable gifted program." JA 8.* Count two is devoid of references to the *First Amendment*. The ambiguous language of count two creates a mystery as to what constitutional protection or protections plaintiff sought to invoke.

*

Count Two

42 U.S.C. § 1983

(Against the School Board and Against the Individuals in both their

Official and Individual Capacities)

45. The *Fourteenth Amendment to the United States Constitution* requires that a state shall not "deny to any person within its juris diction the full protection of the laws."

46. *42 U.S.C. § 1983* provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of and State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the juris diction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

47. Under *42 U.S.C. § 1983*, Defendants, acting under color of state law, may be held liable for their actions in violating the constitu tional rights of Peters under the *Fourteenth Amendment*, namely by retaliating against her because of her advocacy for a racially equita ble gifted program in the District.

48. The Defendants violated the Constitutional rights of Peters when they retaliated against her for promoting a racially equitable gifted program in the District.

[**54]

Moreover, as the case progressed to the summary judgment stage, plaintiff failed to develop her argument to the court to clarify that she was asserting a *first amendment* claim. Instead, plaintiff's counsel continued to present vague and nonspecific arguments regarding the type of constitutional violation alleged. In fact, the record reveals that plaintiff's counsel on two separate occasions represented to the district court that she was asserting an equal protection claim in count two. See JA 253 (urging district court in response brief opposing summary judgment to "deny the Defendants' motion for summary judgment on the issue of *§ 1983 equal protection*" (emphasis added)); JA 1216 (stating to district court during summary judgment hearing "I would like to move on to the second count . . . and that is the *equal protection claim*" (emphasis added)). In light of counsel for plaintiff's representations, I cannot agree with the majority's conclusion that if "this method of pleading created ambiguity as between a procedural due process or equal protection claim and a *First Amendment* claim, the facts alleged as the basis for the claim would make it clear that the claim arose under [**55] the *First Amendment*." Slip op. at 20. Neither is it relevant that the facts asserted in plaintiff's complaint would support a *First Amendment* claim where, as here, plaintiff failed to present the *First Amendment* argument to the district court. Cf. *Picard v. Connor, 404 U.S. 270, 277, 30 L. Ed. 2d 438, 92 S. Ct. 509 (1971)* (holding in the context of exhaustion that even when petitioner presented all the facts supporting constitutional claim, it was error for a court of appeals to decide a constitutional theory not fairly presented to state court). Liberal pleading rules do not require a defendant or the court to hypothesize as to the constitutional protection a plaintiff seeks to vindicate when plaintiff continues to provide unresponsive and contradictory arguments.

[*328] Moreover, statements from both the district court and defense counsel should have alerted counsel for plaintiff of the need to clarify her pleadings and argument to the court. See generally JA 1217 (questioning by district court at summary judgment hearing regarding as to why plaintiff "did not brief the free speech issue"); JA 1240 (concluding that "pleadings by plaintiff create a bit of mystery to [the [**56] court] as to actually what they are seeking" in count two). Despite the expressed dissatisfaction of the district court, plaintiff did not move the district court, as she might have, to amend her complaint, but instead, now, in effect, seeks permission from this court to amend her complaint to add a *First Amendment* claim. The facts do not support effectively allowing plaintiff to move to amend for the first time on appeal. Accordingly, I would affirm the district court's decision that plaintiff failed to state a *First Amendment* claim.

LEXSEE 380 F3D 209

WILLIAM PRICE, Plaintiff-Appellant, v. TOMMY G. THOMPSON, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendant-Appellee.

No. 03-2184

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

380 F.3d 209; 2004 U.S. App. LEXIS 17232; 94 Fair Empl. Prac. Cas. (BNA) 449; 85 Empl. Prac. Dec. (CCH) P41,734

May 5, 2004, Argued
August 18, 2004, Decided

PRIOR HISTORY: [**1] Appeal from the United States District Court for the District of Maryland, at Baltimore. (CA-02-3721-MJG). Marvin J. Garbis, Senior District Judge.

DISPOSITION: Affirmed.

LexisNexis(R) Headnotes

COUNSEL: ARGUED: Leizer Zalman Goldsmith, Washington, D.C., for Appellant.

John Walter Sippel, Jr., Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee.

ON BRIEF: Thomas M. DiBiagio, United States Attorney, Baltimore, Maryland, for Appellee.

JUDGES: Before WILKINS, Chief Judge, NIEMEYER, Circuit Judge, and Pasco M. BOWMAN, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation. Senior Judge Bowman wrote the opinion, in which Chief Judge Wilkins and Judge Niemeyer joined.

OPINIONBY: Bowman

OPINION: [*211] BOWMAN, Senior Circuit Judge: In this failure-to-hire retaliation case, we must consider whether the selecting official's inconsistent statements are enough to satisfy the plaintiff's burden of proof as to the elements of his prima facie case and as to pretext. The District Court determined that these inconsistencies did not provide sufficient evidence of pretext and granted summary judgment to the defendant. William Price, the plaintiff, [**2] appeals. We affirm.

This case stems from Price's unsuccessful attempts to gain employment at the National Institutes of Health (NIH). In 1995, Price applied for a job as a Medical Equipment Repairer. Price was one of four candidates classified as highly qualified after an initial round of screening, and he was subsequently interviewed in early May by the selecting official, Johnny Robbins. Ultimately, Robbins selected two of the highly qualified applicants but not Price. In late August of 1995, after Robbins made his selections, Price ran into Robbins on the NIH campus and they had a brief, friendly conversation about what Price might do to be a more attractive candidate. In response to Price's questions, Robbins did offer some suggestions and, over the next several months, Price followed through on some of those suggestions. In January of 1996, Price learned that one of the individuals that Robbins hired had, in Price's estimation, inferior credentials. To confirm that this individual was in fact the one who was hired, Price phoned him at NIH, ostensibly to congratulate him on getting the job and to ask after any future openings at NIH. This individual later informed Robbins about [**3] the call. On January 22, 1996, three days after his phone call, Price filed an EEO complaint alleging that he had been discriminated

[*212] against in the hiring process. During the investigation, the EEO counselor spoke with Robbins about the complaint twice, but for only approximately one minute each time. It was during one of these brief conversations that Robbins related to the EEO counselor the fact of Price's phone call to one of the successful candidates. Eventually, the EEO counselor filed a report concluding there had been no discrimination.

In July of 1996, Price applied for a Biomedical Engineering Technician position at NIH, for which Robbins was also the selecting official. Price was again included on the list of highly qualified applicants, was again interviewed (in October), but was again not selected. Thereafter, Price filed another EEO complaint that raised several charges of discrimination as well as a charge of retaliation based on his prior EEO complaint. Price dropped his discrimination claims and his retaliation charge was heard by an EEOC administrative law judge who, after a full hearing, ruled there had been no retaliation for Price's prior protected activity. Price [**4] then filed this suit in federal court alleging that Robbins violated *42 U.S.C. § 2000e-3 (2000)* when he retaliated against Price by refusing to select him on account of his prior EEO complaint. The District Court concluded that Price could not prove his prima facie case because Price was unable to demonstrate that Robbins knew Price had filed the EEO complaint and, even assuming the existence of a prima facie case, because Price was unable to show Robbins's reasons for not selecting him were pretextual. We review the District Court's summary judgment decision de novo, reading the record in the light most favorable to Price, the non-moving party. *Dugan v. Albemarle County Sch. Bd., 293 F.3d 716, 720 (4th Cir. 2002)*.

A plaintiff lacking direct evidence of retaliation may utilize the *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)*, framework to prove a claim of retaliation. *Williams v. Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir. 1989)*. In the *McDonnell Douglas* framework, the plaintiff must first establish a prima facie case of retaliation, whereupon the burden shifts to the employer [**5] to establish a legitimate non-retaliatory reason for the action. If the employer sets forth a legitimate, non-retaliatory explanation for the action, the plaintiff then must show that the employer's proffered reasons are pretextual or his claim will fail. More specifically, the plaintiff can prove pretext by showing that the "explanation is 'unworthy of credence' or by offering other forms of circumstantial evidence sufficiently probative of [retaliation]." *Mereish v. Walker, 359 F.3d 330, 336 (4th Cir. 2004)* (quoting *Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981)*). We turn now to the first part of the *McDonnell Douglas* test, the prima facie case.

To establish his prima facie case of retaliation, Price must show that he engaged in protected activity, that Robbins took adverse action against him, and that a causal relationship existed between the protected activity and the adverse employment activity. *King v. Rumsfeld, 328 F.3d 145, 150-51 (4th Cir.), cert. denied, 540 U.S. 1073, 157 L. Ed. 2d 742, 124 S. Ct. 922 (2003)*. The parties agree that Price can satisfy the first two elements of his [**6] prima facie case: Price's EEO complaint is protected activity, and the later decision not to hire him is an adverse action. For its part, the District Court concluded that Price was unable to demonstrate a causal connection between his EEO complaint and Robbins's decision not to hire him

[*213] because Price could not show that Robbins knew Price was the individual who filed the complaint. Viewing the record, however, in the light most favorable to Price, we conclude that a reasonable trier of fact could find that Robbins knew Price was the individual who filed the EEO complaint based on the circumstantial evidence that Price has presented. First, as Price points out, the pool of possible complainants was small: there were only two highly qualified applicants who were not selected. Second, the August meeting between Price and Robbins, though cordial, could have alerted Robbins to Price's doubts about the decision not to hire him, especially in light of the EEO investigation. Third, Robbins knew that Price called one of the hirees; Robbins subsequently relayed this information to the EEO counselor. It is also the case that Robbins testified that he did not know Price was the complainant and [**7] that the EEO counselor testified that she did not tell Robbins who the complainant was and that she had no reason to believe that Robbins knew who the complainant was. Still, a reasonable factfinder could elect not to credit fully the testimony supportive of Robbins in favor of the circumstantial evidence tending to show that Robbins knew or strongly suspected that Price was the complainant.

Knowledge alone, however, does not establish a causal connection between Price's protected activity and Robbins's decision not to hire him. Previously, this Court has held that a causal connection for purposes of demonstrating a prima facie case exists where the employer takes adverse employment action against an employee shortly after learning of the protected activity. *Cerberonics, Inc., 871 F.2d at 457*. We assume, without deciding, that in the failure-to-hire context, the employer's knowledge coupled with an adverse action taken at the first opportunity satisfies the causal connection element of the prima facie case. *Cf. Williams v. The Nashville Network, 132 F.3d 1123, 1132 (6th Cir. 1997)* (finding causal connection where secretary forwarded plaintiff's applications [**8] for further consideration prior to EEOC complaint, but did not forward subsequent applications). We are also mindful, however, of the fact that generally the passage of time (nine to ten months in this case) tends to negate the inference of discrimination. *See Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273-74, 149 L. Ed. 2d 509, 121 S. Ct. 1508 (2001)* (per curiam) (citing cases); *Dowe v. Total Action Against Poverty, 145 F.3d 653, 657 (4th Cir. 1998)*. Though we regard it as a very close question, we conclude that Price has established a prima facie case of discrimination because a reasonable trier of fact could conclude that Robbins knew of the protected activity and because Robbins, at the first available opportunity, declined to hire Price.

Price urges that the District Court erred when it concluded that he was unable to show that Robbins's explanations for refusing to hire him were pretextual. Specifically, he contends that he has rebutted the legitimate nonretaliatory explanations that were offered by showing inconsistencies in Robbins's testimony and by eliciting admissions regarding these explanations. Thus, he claims that under *Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000)*, [**9] he is not required to provide additional evidence of discrimination and is entitled to survive summary judgment.

In *Reeves* and its predecessor, *St. Mary's Honor Center v. Hicks, 509 U.S. 502, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993)*, the Supreme Court had occasion to consider what showing a plaintiff had to make regarding pretext and, specifically,

[*214] whether a plaintiff could satisfy his or her burden by merely rebutting the defendant's explanation for the action. In doing so, the Court held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves, 530 U.S. at 148.* This Court has applied the *Reeves* formulation and has explained that it operates based on "the strength of the prima facie evidence in creating an inference of discrimination, and 'the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt.'" *Dennis v. Columbia Colleton Med. Ctr., Inc., 290 F.3d 639, 648 (4th Cir. 2002)* [**10] (quoting *Reeves, 530 U.S. at 147*). A prima facie case coupled with probative evidence "that the employer's explanation is false," *Reeves, 530 U.S. at 149*, would counsel against granting the employer summary judgment unless the employer presented other strong evidence from which "no reasonable factfinder could conclude" that there was discrimination. *Id. at 148.* More generally, *Reeves* states:

> Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law.

Id. at 148-49.

As a matter of fact, when this Court has applied the *Reeves* methodology to sustain a verdict or to allow a plaintiff to survive summary judgment, it appears to have done so only in cases where the plaintiff had a substantially stronger case than Price has in the case at bar. *Compare Dennis, 290 F.3d at 649-50* [**11] (affirming jury verdict for plaintiff) *with Mereish, 359 F.3d at 336-37* (holding that stray comments regarding generational change were insufficient evidence of pretext in ADEA claim) *and Rowe v. Marley Co., 233 F.3d 825, 830-31 (4th Cir. 2000)* (affirming grant of summary judgment and concluding plaintiff had not "forecast any evidence that casts doubt on the veracity of [the employer's] proffered explanation for his termination."). In *EEOC v. Sears Roebuck & Co.*, for instance, this Court reversed a grant of summary judgment in favor of the employer after applying the *Reeves* formulation. *243 F.3d 846 (4th Cir. 2001).* The Court concluded that "the EEOC made out a strong prima facie case of national origin discrimination and offered ample evidence to discredit Sears's proffered non-discriminatory reason for its failure to hire Santana." *Id. at 854.* In that case, the Court emphasized the fact that the plaintiff

> presented uncontroverted evidence of a strong prima facie case—despite his repeated applications, his superb qualifications, and his expressed willingness to accept any available position, Sears [**12] refused to hire him . . . and instead hired a Caucasian woman who, Sears itself concedes, was less qualified than [the plaintiff].

Id. at 852. Moreover, the Court concluded, and the employer largely conceded, that the proffered non-discriminatory reasons were inconsistent over time, false, and in some instances based on mistakes of fact on the employer's part. n1 In those

[*215] circumstances, the plaintiff was entitled to survive summary judgment. In short, the Court found a strong prima facie case and a strong showing of pretext. *Id. at 857* ("There is a clear prima facie case of employment discrimination, a good deal of evidence of pretext casting serious doubt on the employer's proffered justification for its job action, and nothing to prevent a rational fact-finder from finding that the employer was motivated by discriminatory reasons."). The present case is demonstrably different.

n1 We note that mere mistakes of fact are not evidence of unlawful discrimination. *See, e.g., Jordan v. Summers, 205 F.3d 337, 344 (7th Cir. 2000)* (" Pretext is a lie, not merely a mistake.").

[**13]

Here, as we already have suggested, Price has not put forward a particularly strong prima facie case of retaliation. Fatal to his attempt to invoke *Reeves* is that his showing of pretext is equivocal at best. In his EEOC investigation affidavit, Robbins offered essentially four reasons for not hiring Price for the second position: that Price was less experienced (especially with laboratory equipment); that Price was not certified; that Price was not currently working in the field, had experienced a break in service, and might require extra training; and that Price wanted to redefine the position. Price asserts that he has demonstrated that these reasons were pretext for retaliation because the reasons are based on mistakes of fact or because Robbins has taken inconsistent positions regarding them. We disagree.

With respect to the candidates' experience level, Price points out that Robbins later admitted that Price was "quite equal as far as experience" to the candidates who were hired. EEOC Admin. Tr. at 58 (Dec. 8, 1998). Consequently, he argues, Robbins's earlier claim that he was not as experienced must have been pretext. We agree that a thorough review of Price's application [**14] reveals a great deal of experience with laboratory and patient-care equipment. Still, it was Robbins's testimony that this information struck him later, only after he "read the applications several times . . . to make sure that there wasn't something that I perhaps overlooked." *Id.* at 60. This answer squares with our own review of Price's application, which highlights his experience with patient-care equipment as opposed to purely laboratory equipment. For instance, the OF 612 form that Price filled out, which lists his last two jobs, speaks largely in terms of familiarity with medical equipment and mentions laboratory equipment almost as an afterthought: "My primary responsibility was to test, calibrate, maintain, install, and repair biomedical instrumentation such as portable xray units, patient monitors, gas lasers, ultrasound imagers, blood gas analyzers, surgical devices, and laboratory equipment." *Joint App.* at 150. Price's other application materials also list and discuss his familiarity with medical equipment before discussing his familiarity with laboratory equipment. Similarly, although his performance ratings were outstanding, his supervisor discussed his work on [**15] medical, not laboratory, equipment. *Id.* at 152 (" Mr. Price demonstrated excellent performance in his knowledge and technical ability to affect [sic] repairs on medical equipment and systems. His skills were instrumental in keeping all major X-Ray Systems and medical equipment in Urology functioning."). Nor is it the case, as it was in *Sears Roebuck*, that the candidates who were hired were demonstrably *less* qualified than Price. In these circumstances, we cannot say that Robbins's reassessment of Price's experience bespeaks pretext.

[*216] As for Robbins's claim that the hirees were certified and that Price was not, this appears to be incorrect and could be evidence of pretext. Still, this evidence does not hint greatly of pretext because Price has not adduced other substantial evidence of pretext or evidence of mendacity to support an inference that the incorrect reason was not merely the honest mistake that Robbins suggests explains his inconsistencies. *See* EEOC Tr. at 62. n2 More to the point, the only evidence in the record suggests that Robbins believed the two hirees were certified because they brought this fact to his attention. In contrast, Price apparently never [**16] highlighted to Robbins the fact that he was certified. n3 A reasonable trier of fact could easily conclude that Robbins was wrong about Price's certification status but would be hard-pressed to conclude that this established pretext.

n2 Robbins's testimony at the EEOC hearing includes the following:

> Q: [Plaintiff's Counsel] And why is your testimony different today?
>
> A: [Robbins] I don't think it's different. I just think that I'm just in a position sometimes to supply some additional information.
>
> Q: So you couldn't have supplied that information to me at the time? Is that right? At the deposition?
>
> A: I was very nervous at the time and I still am today.

EEOC Tr. at 62. Robbins explained other of the inconsistencies saying:

> Okay. This is my first time dealing with an EEO complaint and sometimes when you're dealing with something for the first time, some of the things you do forget. Sometimes if you're asked the same question several months later or a year later you will remember different things. And this is what happened in this particular situation here is that there was [sic] quite a few questions during that first deposition that I just could not remember what took place on that particular day in your office. *Id.* at 58. [**17]

n3

> A: [Robbins] I do recall Mr. Gantt was saying that he had been a biomedical engineering technician for maybe six or eight months and . . . Mr. Baron, he had proof of his certification with his application.
>
> Q: [Plaintiff's Counsel] I'm sorry. You said Mr. Gantt had what as far as certification?
>
> A: He had—I believe he said he had been working as a biomedical engineering technician for I guess at that time from six to eight months.
>
> ****
>
> Q: What organization or organizations certifies biomedical engineering techs?
>
> A: I do not know.
>
> Q: So why did you use the term certified on your affidavit?
>
> A: It was a requirement from my supervisor at the time.
>
> Q: Your supervisor said you had to sign an affidavit that said something about certification?
>
> A: No. The requirement was in the PD [position description?]. And so when I wrote the affidavit, I put that in there.
>
> Q: You put in there that Mr. Gantt had certification; yes? Yes or no?
>
> A: And Mr. Baron, I believe.
>
> Q: But in fact, you don't know if Mr. Gantt is certified at all. Is that right?
>
> A: Only what he told me, that he had been working as a biomedical engineering technician for six to eight months.
>
> Q: How long had Mr. Price been working as a biomedical engineer at that time?

A: As I recall, I'm thinking maybe seven or eight years.

Q: Was Mr. Price certified?

A: Yes.

EEOC Tr. at 62–64.

[**18]

Price next argues that he can show pretext in Robbins's claim that he (Price) would require extra training. Specifically, Price claims that Robbins's explanation that the hirees were preferable because they were already working in the field (and would not require training) is false because when asked what extra training Price might require, Robbins stated that "I do not know [why this would be a problem]." *Id.* at 67. But Price can create this seeming inconsistency only by taking

[*217] Robbins's testimony out of context. We note that seven lines later, in response to the question, "What was the connection between the break in service and Mr. Price not being selected?", Robbins explained that the connection was "the changes in technology. If there's a break in service and whatnot. A lots [sic] of changes take place within two to three years." *Id.; see also id.* at 61 (" Mr. Price had been out of the field for a few years and Mr. Gantt and Mr. Baron [were] currently working in that particular field, I think across the board, Mr. Price would require some additional training."). We see no inconsistency in Robbins's explanation and cannot conclude that a reasonable trier of fact [**19] could find this reason was pretextual.

With respect to Robbins's claim that Price suggested he wanted to redefine the position, we see no evidence of pretext whatsoever. In his EEOC affidavit and in his testimony, Robbins consistently explained that because Price mentioned that "he could also see [the job] as someone acting as a liaison between me and the engineering staff and the administrative staff," Robbins concluded that Price wanted to redefine the position. *Id.* at 65-66. As Robbins further explained, being a liaison "was not a requirement of that position description," *id.* at 66, and reflected unfavorably on Price's candidacy. n4 At most, Price earned an admission that this was a somewhat intangible factor and that Robbins was unsure precisely what weight it played in the hiring decision. *Id.* at 67. We conclude that a reasonable trier of fact could not find that Robbins's cryptic concession about the weight that Price's desire to redefine the position played in Robbins's decision not to hire Price is evidence from which a reasonable trier of fact could find pretext.

n4

> Q: [Plaintiff's Counsel] Did you consider Mr. Price's remark to you in that regard about being a liaison as unfavorably reflecting on his candidacy?
>
> A: [Robbins] Well, yes, if he wants to—if he's trying in some way to redefine what that particular position was all about or is all about. *Id.* at 66.

[**20]

At most, therefore, Price can demonstrate that Robbins was wrong about one reason (certification) and was misled by Price's own application as to Price's level of experience. As for the other two nondiscriminatory reasons (Price's need for extra training and that Price wanted to redefine the position), the plaintiff has not shown pretext. In these circumstances, there is insufficient probative evidence of pretext to permit a court to send this case to the jury under *Reeves*. While "it is *permissible* for the trier of fact to infer the ultimate fact of [retaliation] from the falsity of the employer's explanation," *Reeves, 530 U.S. at 147*, it is axiomatic that the plaintiff must in fact provide sufficient evidence from which a reasonable trier of fact could find falsity. Here, Price has failed to come forward with that sort of evidence. Accordingly, the District Court did not err when it granted the defendant summary judgment. n5

> n5 We pause here to emphasize that although *Reeves* will allow a plaintiff to survive summary judgment without presenting independent evidence of discrimination (or retaliation), it will permit this only where the other evidence of discrimination is sufficiently strong to ensure that the employer is held liable for unlawful discrimination and not merely for inconsistent statements that arise from reading applications hastily or from being nervous during depositions. This is a crucial point because our laws impose liability only when "the employer's action was the product of unlawful discrimination" and do not impose liability simply because "the employer's explanation of its action was not believable." *Hicks, 509 U.S. at 514, 515.*

[**21]

[*218] For the foregoing reasons, the judgment of the District Court is affirmed. *AFFIRMED*

LEXSEE 530 US 133

ROGER REEVES v. SANDERSON PLUMBING PRODUCTS, INC.

No. 99-536

SUPREME COURT OF THE UNITED STATES

530 U.S. 133; 120 S. Ct. 2097; 147 L. Ed. 2d 105; 2000 U.S. LEXIS 3966; 68 U.S.L.W. 4480; 82 Fair Empl. Prac. Cas. (BNA) 1748; 78 Empl. Prac. Dec. (CCH) P40,045; 2000 Cal. Daily Op. Service 4629; 2000 Daily Journal DAR 6199; 2000 Colo. J. C.A.R. 3474; 13 Fla. L. Weekly Fed. S 406

March 21, 2000, Argued
June 12, 2000, Decided

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

DISPOSITION: *197 F.3d 688,* reversed.

LexisNexis(R) Headnotes

SYLLABUS: Petitioner Reeves, 57, and Joe Oswalt, in his mid-30's, were the supervisors in one of respondent's departments known as the "Hinge Room," which was managed by Russell Caldwell, 45. Reeves' responsibilities included recording the attendance and hours worked by employees under his supervision. In 1995, Caldwell informed Powe Chesnut, the company's director of manufacturing, that Hinge Room production was down because employees were often absent, coming in late, and leaving early. Because the monthly attendance reports did not indicate a problem, Chesnut ordered an audit, which, according to his testimony, revealed numerous timekeeping errors and misrepresentations by Caldwell, Reeves, and Oswalt. Chesnut and other company officials recommended to the company president, Sandra Sanderson, that Reeves and Caldwell be fired, and she complied. Reeves filed this suit, contending that he had been terminated because of his age in violation of the Age Discrimination in Employment Act of 1967 (ADEA). At trial, respondent contended Reeves had been fired due to his failure to maintain accurate attendance records. Reeves attempted to demonstrate that this explanation was pretext for age discrimination, introducing evidence that he had accurately recorded the attendance and hours of the employees he supervised, and that Chesnut, whom Oswalt described as wielding "absolute power" within the company, had demonstrated age-based animus in his dealings with him. The District Court denied respondent's motions for judgment as a matter of law under *Federal Rule of Civil Procedure 50*, and the case went to the jury, which returned a verdict for Reeves. The Fifth Circuit reversed. Although recognizing that Reeves may well have offered sufficient evidence for the jury to have found that respondent's explanation was pretextual, the court explained that this did not mean that Reeves had presented sufficient evidence to show that he had been fired because of his age. In finding the evidence insufficient, the court weighed the additional evidence of discrimination introduced by Reeves against other circumstances surrounding his discharge, including that Chesnut's age-based comments were not made in the direct context of Reeves' termination; there was no allegation that the other individuals who recommended his firing were motivated by age; two of those officials were over 50; all three Hinge Room supervisors were accused of inaccurate recordkeeping; and several of respondent's managers were over 50 when Reeves was fired.

Held:

1. A plaintiff's prima facie case of discrimination (as defined in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817, and subsequent decisions), combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, may be adequate to sustain a finding of liability for intentional discrimination under the ADEA. In this case, Reeves established a prima facie case and made a substantial showing that respondent's legitimate, nondiscriminatory explanation, *i.e.,* his shoddy recordkeeping, was false. He offered evidence showing that he had properly maintained the attendance records in question and that cast doubt on whether he was responsible for any failure to discipline late and absent employees. In holding that the evidence was insufficient to sustain the jury's verdict, the Fifth Circuit ignored

this evidence, as well as the evidence supporting Reeves' prima facie case, and instead confined its review of the evidence favoring Reeves to that showing that Chesnut had directed derogatory, age-based comments at Reeves, and that Chesnut had singled him out for harsher treatment than younger employees. It is therefore apparent that the court believed that only this additional evidence of discrimination was relevant to whether the jury's verdict should stand. In so reasoning, the court misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence. In *St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511, 125 L. Ed. 2d 407, 113 S. Ct. 2742,* the Court stated that, because the factfinder's disbelief of the reasons put forward by the defendant, together with the elements of the prima facie case, may suffice to show intentional discrimination, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination. Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it can be quite persuasive. See *id. at 517.* In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. See, *e.g., Wright v. West, 505 U.S. 277, 296, 120 L. Ed. 2d 225, 112 S. Ct. 2482.* Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. Cf. *Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577, 57 L. Ed. 2d 957, 98 S. Ct. 2943.* Such a showing by the plaintiff will not *always* be adequate to sustain a jury's liability finding. Certainly there will be instances where, although the plaintiff has established a prima facie case and introduced sufficient evidence to reject the employer's explanation, no rational factfinder could conclude that discrimination had occurred. This Court need not — and could not — resolve all such circumstances here. In this case, it suffices to say that a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. Pp. 5–14.

2. Respondent was not entitled to judgment as a matter of law under the particular circumstances presented here. Pp. 14–19.

(a) Rule 50 requires a court to render judgment as a matter of law when a party has been fully heard on an issue, and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue. The standard for judgment as a matter of law under Rule 50 mirrors the standard for summary judgment under Rule 56. Thus, the court must review all of the evidence in the record, cf., *e.g., Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348,* drawing all reasonable inferences in favor of the nonmoving party, but making no credibility determinations or weighing any evidence, *e.g., Lytle v. Household Mfg., Inc., 494 U.S. 545, 554–555, 108 L. Ed. 2d 504, 110 S. Ct. 1331.* The latter functions, along with the drawing of legitimate inferences from the facts, are for the jury, not the court. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505.* Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. Pp. 14–16.

(b) In holding that the record contained insufficient evidence to sustain the jury's verdict, the Fifth Circuit misapplied the standard of review dictated by Rule 50. The court disregarded evidence favorable to Reeves — the evidence supporting his prima facie case and undermining respondent's nondiscriminatory explanation — and failed to draw all reasonable inferences in his favor. For instance, while acknowledging the potentially damning nature of Chesnut's age-related comments, the court discounted them on the ground that they were not made in the direct context of Reeves' termination. And the court discredited Reeves' evidence that Chesnut was the actual decisionmaker by giving weight to the fact that there was no evidence suggesting the other decisionmakers were motivated by age. Moreover, the other evidence on which the court relied — that Caldwell and Oswalt were also cited for poor recordkeeping, and that respondent employed many managers over age 50 — although relevant, is certainly not dispositive. See *Furnco, supra, at 580.* The ultimate question in every disparate treatment case is whether the plaintiff was the victim of intentional discrimination. Here, the District Court informed the jury that Reeves was required to show by a preponderance of the evidence that his age was a determining and motivating factor in the decision to terminate him. It instructed the jury that, to show respondent's explanation was pretextual, Reeves had to demonstrate that age discrimination, not respondent's explanation, was the real reason for his discharge. Given that Reeves established a prima facie case, introduced enough evidence for the jury to reject respondent's explanation, and produced additional evidence that Chesnut was motivated by age-based animus and was principally responsible for Reeves' firing, there was sufficient evidence for the jury to conclude that respondent had intentionally discriminated. Pp. 16–19.

197 F.3d 688, reversed.

COUNSEL: Jim Waide argued the cause for petitioner.

Patricia A. Millett argued the cause for the United States, as amicus curiae, by special leave of court.

Taylor B. Smith argued the cause for respondent.

JUDGES: O'CONNOR, J., delivered the opinion for a unanimous Court. GINSBURG, J., filed a concurring opinion.

OPINIONBY: O'CONNOR

OPINION: [*137] [**2103] [***113] JUSTICE O'CONNOR delivered the opinion of the Court.

[***LEdHR1A] [1A] [***LEdHR2A] [2A]This case concerns the kind and amount of evidence necessary to sustain a jury's verdict that an employer unlawfully discriminated on the basis of age. Specifically, we must resolve whether a defendant is entitled to judgment as a matter of law when the plaintiff's case consists exclusively of a prima facie case of discrimination and sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory explanation for its action. We must also decide whether the employer was entitled to judgment as a matter of law under the particular circumstances presented here.

I

In October 1995, petitioner Roger Reeves was 57 years old and had spent 40 years in the employ of respondent, Sanderson Plumbing Products, Inc., a manufacturer of toilet seats and covers. *197 F.3d 688, 690 (CA5 1999).* Petitioner worked in a department known as the "Hinge Room," where he supervised the "regular line." *Ibid.* Joe Oswalt, in his mid-thirties, supervised the Hinge Room's "special line," and Russell Caldwell, the manager of the Hinge Room and age 45, supervised both petitioner and Oswalt. *Ibid.* Petitioner's responsibilities included recording the attendance and hours of those under his supervision, and reviewing a weekly report that listed the hours worked by each employee. *3 Record 38–40.* [***114]

In the summer of 1995, Caldwell informed Powe Chesnut, the director of manufacturing and the husband of company president Sandra Sanderson, that "production was down" in

[*138] the Hinge Room because employees were often absent and were "coming in late and leaving early." 4 *id.* at 203–204. Because the monthly attendance reports did not indicate a problem, Chesnut ordered an audit of the Hinge Room's timesheets for July, August, and September of that year. *197 F.3d at 690.* According to Chesnut's testimony, that investigation revealed "numerous timekeeping errors and misrepresentations on the part of Caldwell, Reeves, and Oswalt." *Ibid.* Following the audit, Chesnut, along with Dana Jester, vice president of human resources, and Tom Whitaker, vice president of operations, recommended to company president Sanderson that petitioner and *Caldwell be fired. 197 F.3d at 690–691.* In October 1995, Sanderson followed the recommendation and discharged both petitioner and *Caldwell. 197 F.3d at 691.*

In June 1996, petitioner filed suit in the United States District Court for the Northern District of Mississippi, contending that he had been fired because of his age in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, *29 U.S.C. § 621 et seq.* At trial, respondent contended that it had fired petitioner due to his failure to [**2104] maintain accurate attendance records, while petitioner attempted to demonstrate that respondent's explanation was pretext for age discrimination. *197 F.3d at 692–693.* Petitioner introduced evidence that he had accurately recorded the attendance and hours of the employees under his supervision, and that Chesnut, whom Oswalt described as wielding "absolute power" within the company, *3 Record 80,* had demonstrated age-based animus in his dealings with petitioner. *197 F.3d at 693.*

During the trial, the District Court twice denied oral motions by respondent for judgment as a matter of law under *Rule 50 of the Federal Rules of Civil Procedure,* and the case went to the jury. *3 Record 183;* 4 *id.* at 354. The court instructed the jury that "if the plaintiff fails to prove age was a determinative or motivating factor in the decision to

[*139] terminate him, then your verdict shall be for the defendant." Tr. 7 (Jury Charge) (Sept. 12, 1997). So charged, the jury returned a verdict in favor of petitioner, awarding him $35,000 in compensatory damages, and found that respondent's age discrimination had been "willful." *197 F.3d at 691.* The District Court accordingly entered judgment for petitioner in the amount of $70,000, which included $35,000 in liquidated damages based on the jury's finding of willfulness. *Ibid.* Respondent then renewed its motion for judgment as a matter of law and alternatively moved for a new trial, while petitioner moved for front pay. 2 Record, Doc. Nos. 36, 38. The District Court denied respondent's motions and granted petitioner's, awarding him $28,490.80 in front pay for two years' lost income. 2 *id.* Doc. Nos. 40, 41.

The Court of Appeals for the Fifth Circuit reversed, holding that petitioner had not introduced sufficient evidence to sustain the jury's finding of unlawful discrimination. *197 F.3d at 694.* After noting respondent's proffered justification for petitioner's discharge, the court acknowledged that petitioner "very well may" have offered sufficient evidence for "a reasonable [***115] jury [to] have found that [respondent's] explanation for its employment decision was pretextual." *Id. at 693.* The court explained, however, that this was "not dispositive" of the ultimate issue — namely, "whether Reeves presented sufficient evidence that his age motivated [respondent's] employment decision." *Ibid.* Addressing this question, the court weighed petitioner's additional evidence of discrimination against other circumstances surrounding his discharge. See *id. at 693–694.* Specifically, the court noted that Chesnut's age-based comments "were not made in the direct context of Reeves's termination"; there was no allegation that the two other individuals who had recommended that petitioner be fired (Jester and Whitaker) were motivated by age; two of the decisionmakers involved in petitioner's discharge (Jester and Sanderson) were over the age of 50; all three of the Hinge Room supervisors were

[*140] accused of inaccurate recordkeeping; and several of respondent's management positions were filled by persons over age 50 when petitioner was fired. *Id. at 693–694.* On this basis, the court concluded that petitioner had not introduced sufficient evidence for a rational jury to conclude that he had been discharged because of his age. *Id. at 694.*

We granted certiorari, *528 U.S. 985 (1999),* to resolve a conflict among the Courts of Appeals as to whether a plaintiff's prima facie case of discrimination (as defined in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)),* combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination. Compare *Kline v. TVA, 128 F.3d 337 (CA6 1997)* (prima facie case combined with sufficient evidence to disbelieve employer's explanation always creates jury issue of whether employer intentionally discriminated); *Combs v. Plantation Patterns,* [**2105] *106 F.3d 1519 (CA11 1997)* (same), cert. denied, *522 U.S. 1045 (1998); Sheridan v. E. I. DuPont de Nemours & Co., 100 F.3d 1061 (CA3 1996)* (same) (en banc), cert. denied, *521 U.S. 1129, 138 L. Ed. 2d 1031, 117 S. Ct. 2532 (1997); Gaworski v. ITT Commercial Finance Corp., 17 F.3d 1104* (CA8) (same), cert. denied, *513 U.S. 946, 130 L. Ed. 2d 310, 115 S. Ct. 355 (1994); Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (CA7 1994)* (same); *Washington v. Garrett, 10 F.3d 1421 (CA9 1993)* (same), with *Aka v. Washington Hospital Center, 332 U.S. App. D.C. 256, 156 F.3d 1284 (CADC 1998)* (en banc) (plaintiff's discrediting of employer's explanation is entitled to considerable weight, such that plaintiff should not be routinely required to submit evidence over and above proof of pretext), and with *Fisher v. Vassar College, 114 F.3d 1332 (CA2 1997)* (en banc) (plaintiff must introduce sufficient evidence for jury to find both that employer's reason was false and that real reason was discrimination), cert. denied, *522 U.S. 1075, 139 L. Ed. 2d 752, 118 S. Ct. 851 (1998); Rhodes v. Guiberson Oil Tools, 75 F.3d 989 (CA5 1996)* (same); *Theard v. Glaxo, Inc., 47 F.3d 676*

[*141] *(CA4 1995)* (same); *Woods v. Friction Materials, Inc., 30 F.3d 255 (CA1 1994)* (same).

II

[***LEdHR1B] [1B] [***LEdHR2B] [2B] [***LEdHR3] [3] [***LEdHR4A] [4A] [***LEdHR5A] [5A] [***LEdHR6A] [6A] [***LEdHR7A] [7A] [***LEdHR8A] [8A]Under the ADEA, it is "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate [***116] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." *29 U.S.C. § 623*(a)(1). When a plaintiff alleges disparate treatment, "liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Hazen Paper Co. v. Biggins, 507 U.S. 604, 610, 123 L. Ed. 2d 338, 113 S. Ct. 1701 (1993).* That is, the plaintiff's age must have "actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome." *Ibid.* Recognizing that "the question facing triers of fact in discrimination cases is both sensitive and difficult," and that "there will seldom be 'eyewitness' testimony as to the employer's mental processes," *Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 716, 75 L. Ed. 2d 403, 103 S. Ct. 1478 (1983),* the Courts of Appeals, including the Fifth Circuit in this case, have employed some variant of the framework articulated in *McDonnell Douglas* to analyze ADEA claims that are based principally on circumstantial evidence. See, *e.g., Stokes v. Westinghouse Savannah River Co., 206 F.3d 420, 429 (CA4 2000); Galabya v. New York City Bd. of Ed., 202 F.3d 636, 639 (CA2 2000); Hall v. Giant Food, Inc., 336 U.S. App. D.C. 63, 175 F.3d 1074, 1077–1078 (CADC 1999); Beaird v. Seagate Technology Inc., 145 F.3d 1159, 1165* (CA10), cert. denied, *525 U.S. 1054, 142 L. Ed. 2d 556, 119 S. Ct. 617 (1998); Hindman v. Transkrit Corp., 145 F.3d 986, 990–991 (CA8 1998); Turlington v. Atlanta Gas Light Co., 135 F.3d 1428, 1432* (CA11), cert. denied, *525 U.S. 962, 142 L. Ed. 2d 329, 119 S. Ct. 405 (1998); Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (CA3 1997)* (en banc); *Kaniff v. Allstate Ins. Co., 121 F.3d 258, 263 (CA7 1997); Ritter v. Hughes Aircraft Co., 58 F.3d 454, 456–457 (CA9 1995); Bodenheimer v. PPG Industries, Inc., 5 F.3d 955, 957*

[*142] *(CA5 1993); Mesnick v. General Elec. Co., 950 F.2d 816, 823 (CA1 1991),* cert. denied, *504 U.S. 985, 119 L. Ed. 2d 586, 112 S. Ct. 2965 (1992); Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, 69 (CA6 1982).* This Court has not squarely addressed whether the *McDonnell Douglas* framework, developed to assess claims brought under § 703(a)(1) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, *42 U.S.C. § 2000e-2*(a)(1), also applies to ADEA actions. Because the parties do not dispute the issue, we shall assume, *arguendo*, that the *McDonnell Douglas* framework is fully applicable here. Cf. *O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311, 134 L. Ed. 2d 433,* [**2106] *116 S. Ct. 1307 (1996).*

[***LEdHR1C] [1C] [***LEdHR2C] [2C] [***LEdHR4B] [4B] [***LEdHR5B] [5B] [***LEdHR6B] [6B] [***LEdHR7B] [7B] [***LEdHR8B] [8B]*McDonnell Douglas* and subsequent decisions have "established an allocation of the burden of production and an order for the presentation of proof in . . . discriminatory-treatment cases." *St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993).* First, the plaintiff must establish a prima facie case of discrimination. *Ibid.; Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-253, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981).* It is undisputed that petitioner satisfied this burden here: (i) at the time he was fired, he was a member of the class protected by the ADEA ("individuals who are at least 40 years of age," *29 U.S.C. § 631*(a)), (ii) he was otherwise qualified for the position of Hinge Room supervisor, (iii) he was discharged by respondent, and (iv) respondent successively [***117] hired three persons in their thirties to fill petitioner's position. See *197 F.3d at 691-692.* The burden therefore shifted to respondent to "produce evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Burdine, supra, at 254.* This burden is one of production, not persuasion; it "can involve no credibility assessment." *St. Mary's Honor Center, supra, at 509.* Respondent met this burden by offering admissible evidence sufficient for the trier of fact to conclude that petitioner was fired because of his failure to maintain accurate attendance records. See *197 F.3d at 692.* Accordingly, "the *McDonnell Douglas* framework — with

[*143] its presumptions and burdens" — disappeared, *St. Mary's Honor Center, supra, at 510,* and the sole remaining issue was "discrimination *vel non*," *Aikens, supra, at 714.*

[***LEdHR7C] [7C]Although intermediate evidentiary burdens shift back and forth under this framework, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine, 450 U.S. at 253.* And in attempting to satisfy this burden, the plaintiff — once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision — must be afforded the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Ibid.*; see also *St. Mary's Honor Center, 509 U.S. at 507-508.* That is, the plaintiff may attempt to establish that he was the victim of intentional discrimination "by showing that the employer's proffered explanation is unworthy of credence." *Burdine, supra, at 256.* Moreover, although the presumption of discrimination "drops out of the picture" once the defendant meets its burden of production, *St. Mary's Honor Center, supra, at 511,* the trier of fact may still consider the evidence establishing the plaintiff's prima facie case "and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual," *Burdine, supra, at 255, n. 10.*

In this case, the evidence supporting respondent's explanation for petitioner's discharge consisted primarily of testimony by Chesnut and Sanderson and documentation of petitioner's alleged "shoddy record keeping." *197 F.3d at 692.* Chesnut testified that a 1993 audit of Hinge Room operations revealed "a very lax assembly line" where employees were not adhering to general work rules. *4 Record 197-199.* As a result of that audit, petitioner was placed on 90 days' probation for unsatisfactory performance. *197 F.3d at 690.* In 1995, Chesnut ordered another investigation

[*144] of the Hinge Room, which, according to his testimony, revealed that petitioner was not correctly recording the absences and hours of employees. *4 Record 204–205.* Respondent introduced summaries [**2107] of that investigation documenting several attendance violations by 12 employees under petitioner's supervision, and noting that each should have been disciplined in some manner. See App. 21–24, 30–37; *4 Record* [***118] *206–208.* Chesnut testified that this failure to discipline absent and late employees is "extremely important when you are dealing with a union" because uneven enforcement across departments would keep the company "in grievance and arbitration cases, which are costly, all the time." 4 *id. at 206.* He and Sanderson also stated that petitioner's errors, by failing to adjust for hours not worked, cost the company overpaid wages. 3 *id.* at 100, 142, 154; 4 *id.* at 191–192, 213. Sanderson testified that she accepted the recommendation to discharge petitioner because he had "intentionally falsified company pay records." 3 *id.* at 100.

Petitioner, however, made a substantial showing that respondent's explanation was false. First, petitioner offered evidence that he had properly maintained the attendance records. Most of the timekeeping errors cited by respondent involved employees who were not marked late but who were recorded as having arrived at the plant at 7 a.m. for the 7 a.m. shift. 3 *id.* at 118–123; 4 *id.* at 240–247, 283–285, 291, 293–294. Respondent contended that employees arriving at 7 a.m. could not have been at their workstations by 7 a.m., and therefore must have been late. 3 *id.* at 119–120; 4 *id.* at 241, 245. But both petitioner and Oswalt testified that the company's automated timeclock often failed to scan employees' timecards, so that the timesheets would not record any time of arrival. 3 *id.* at 6, 85; 4 *id.* at 334–335. On these occasions, petitioner and Oswalt would visually check the workstations and record whether the employees were present at the start of the shift. 3 *id.* at 6, 85–87;

[*145] 4 *id.* at 335. They stated that if an employee arrived promptly but the timesheet contained no time of arrival, they would reconcile the two by marking "7 a.m." as the employee's arrival time, even if the employee actually arrived at the plant earlier. *Ibid.* On cross-examination, Chesnut acknowledged that the timeclock sometimes malfunctioned, and that if "people were there at their work stations" at the start of the shift, the supervisor "would write in seven o'clock." 4 *id.* at 244. Petitioner also testified that when employees arrived before or stayed after their shifts, he would assign them additional work so they would not be overpaid. See *197 F.3d at 693.*

Petitioner similarly cast doubt on whether he was responsible for any failure to discipline late and absent employees. Petitioner testified that his job only included reviewing the daily and weekly attendance reports, and that disciplinary writeups were based on the monthly reports, which were reviewed by Caldwell. *3 Record 20–22;* 4 *id.* at 335. Sanderson admitted that Caldwell, and not petitioner, was responsible for citing employees for violations of the company's attendance policy. 3 *id.* at 20–21, 137–138. Further, Chesnut conceded that there had never been a union grievance or employee complaint arising from petitioner's recordkeeping, and that the company had never calculated the amount of overpayments allegedly attributable to petitioner's errors. 4 *id.* at 267, 301. Petitioner also testified that, on the day he was fired, Chesnut said that his discharge was due to his failure to report as absent one employee, Gina Mae Coley, on two days in September 1995. 3 *id.* at 23, 70; 4 *id.* at 335–336. But petitioner explained that he had spent those days in the hospital, and that Caldwell was therefore responsible for any overpayment of Coley. 3 *id.* at 17, 22. Finally, petitioner [***119] stated that on previous occasions that employees were paid for hours they had not worked, the company had simply adjusted those employees' next paychecks to correct the errors. 3 *id.* at 72–73.

[*146]

Based on this evidence, the Court of Appeals concluded that petitioner "very well may be correct" that "a reasonable jury could have found that [respondent's] [**2108] explanation for its employment decision was pretextual." *197 F.3d at 693*. Nonetheless, the court held that this showing, standing alone, was insufficient to sustain the jury's finding of liability: "We must, as an essential final step, determine whether Reeves presented sufficient evidence that his age motivated [respondent's] employment decision." *Ibid.* And in making this determination, the Court of Appeals ignored the evidence supporting petitioner's prima facie case and challenging respondent's explanation for its decision. See *id. at 693–694*. The court confined its review of evidence favoring petitioner to that evidence showing that Chesnut had directed derogatory, age-based comments at petitioner, and that Chesnut had singled out petitioner for harsher treatment than younger employees. See *ibid.* It is therefore apparent that the court believed that only this additional evidence of discrimination was relevant to whether the jury's verdict should stand. That is, the Court of Appeals proceeded from the assumption that a prima facie case of discrimination, combined with sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory reason for its decision, is insufficient as a matter of law to sustain a jury's finding of intentional discrimination.

[***LEdHR8C] [8C]In so reasoning, the Court of Appeals misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence. This much is evident from our decision in *St. Mary's Honor Center*. There we held that the factfinder's rejection of the employer's legitimate, nondiscriminatory reason for its action does not *compel* judgment for the plaintiff. *509 U.S. at 511*. The ultimate question is whether the employer intentionally discriminated, and proof that "the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered

[*147] reason . . . is correct." *Id. at 524.* In other words, "it is not enough . . . to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *Id. at 519.*

[***LEdHR1D] [1D] [***LEdHR8D] [8D] [***LEdHR9] [9]In reaching this conclusion, however, we reasoned that it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. Specifically, we stated:

"The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination." *Id. at 511.*

Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence [***120] that is probative of intentional discrimination, and it may be quite persuasive. See *id. at 517* ("Proving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination"). In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." *Wright v. West, 505 U.S. 277, 296, 120 L. Ed. 2d 225, 112 S. Ct. 2482 (1992);* see also *Wilson v. United States, 162 U.S. 613, 620-621, 40 L. Ed. 1090, 16 S. Ct. 895 (1896);* 2 J. Wigmore, Evidence § 278(2), p. 133 (J. Chadbourn rev. ed. 1979). Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely [**2109] alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. Cf. *Furnco Constr. Corp. v.*

[*148] *Waters, 438 U.S. 567, 577, 57 L. Ed. 2d 957, 98 S. Ct. 2943 (1978)* ("When all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts with *some* reason, based his decision on an impermissible consideration"). Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

[***LEdHR1E] [1E]This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. See *Aka v. Washington Hospital Center, 156 F.3d at 1291-1292;* see also *Fisher v. Vassar College, 114 F.3d at 1338* ("If the circumstances show that the defendant gave the false explanation to conceal something other than discrimination, the inference of discrimination will be weak or nonexistent"). To hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review under Rule 50, and we have reiterated that trial courts should not "'treat discrimination differently from other ultimate questions of fact.'" *St. Mary's Honor Center, 509 U.S. at 524* (quoting *Aikens, 460 U.S. at 716).*

Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie

[*149] case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly [***121] may be considered on a motion for judgment as a matter of law. See *infra*, at 15–16. For purposes of this case, we need not — and could not — resolve all of the circumstances in which such factors would entitle an employer to judgment as a matter of law. It suffices to say that, because a prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability, the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination.

III

A

The remaining question is whether, despite the Court of Appeals' misconception of petitioner's evidentiary burden, respondent was nonetheless entitled to judgment as a matter of law. Under Rule 50, a court should render judgment as a matter of law when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." *Fed. Rule Civ. Proc. 50(a)*; see also *Weisgram v. Marley Co., 528 U.S. 440, , 120 S. Ct. 1011, 1018, 145 L. Ed. 2d 958 (2000)* (slip op., at 5–7). The Courts of Appeals have articulated differing formulations as to what evidence a court is to consider in ruling on a Rule 50 motion. See *Venture Technology, Inc.* v. *National Fuel Gas Distribution Corp.*, decided with *Schwimmer v. Sony Corp. of America, 459 U.S. 1007, 1009, 74 L. Ed. 2d 398, 103 S. Ct. 362 (1982)* (WHITE, J., dissenting [**2110] from denial of certiorari). Some decisions have stated that review is limited to that evidence favorable to the nonmoving party, see, *e.g.*, *Aparicio v. Norfolk & Western R. Co., 84 F.3d 803, 807 (CA6 1996); Simpson v. Skelly Oil Co., 371 F.2d 563, 566 (CA8 1967)*, while most have held that review extends to the entire record, drawing all reasonable inferences in favor of the nonmovant, see, *e.g.*, *Tate v. Government Employees Ins. Co.*,

[*150] *997 F.2d 1433, 1436 (CA11 1993); Boeing Co. v. Shipman, 411 F.2d 365, 374 (CA5 1969)* (en banc).

[***LEdHR10] [10] [***LEdHR11A] [11A]On closer examination, this conflict seems more semantic than real. Those decisions holding that review under Rule 50 should be limited to evidence favorable to the nonmovant appear to have their genesis in *Wilkerson v. McCarthy, 336 U.S. 53, 93 L. Ed. 497, 69 S. Ct. 413 (1949)*. See 9A C. Wright & A. Miller, Federal Practice and Procedure § 2529, pp. 297–301 (2d ed. 1995) (hereinafter Wright & Miller). In *Wilkerson*, we stated that "in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of" the nonmoving party. *336 U.S. at 57*. But subsequent decisions have clarified that this passage was referring to the evidence to which the trial court should *give credence*, not the evidence that the court should *review*. In the analogous context of summary judgment under Rule 56, we have stated that the court must review the record "taken as a whole." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. And the standard for granting summary judgment "mirrors" the standard for judgment as a matter of law, such that "the inquiry under each is the same." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250–251, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986);* see also *Celotex* [***122] *Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. It therefore follows that, in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record.

[***LEdHR11B] [11B]In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. *Lytle v. Household Mfg., Inc., 494 U.S. 545, 554–555, 108 L. Ed. 2d 504, 110 S. Ct. 1331 (1990); Liberty Lobby, Inc., supra, at 254; Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696, n. 6, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)*. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Liberty*

[*151] *Lobby, supra, at 255.* Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. See Wright & Miller 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Id. at 300.*

B

[***LEdHR2D] [2D]Applying this standard here, it is apparent that respondent was not entitled to judgment as a matter of law. In this case, in addition to establishing a prima facie case of discrimination and creating a jury issue as to the falsity of the employer's explanation, petitioner introduced additional evidence that Chesnut was motivated by age-based animus and was principally responsible for petitioner's firing. Petitioner testified that Chesnut had told him that he "was so old [he] must have come over on the Mayflower" and, on one occasion when petitioner was having difficulty starting a machine, that he "was too damn old to do [his] job." *3 Record 26.* According to petitioner, [**2111] Chesnut would regularly "cuss at me and shake his finger in my face." 3 *id. at 26-27.* Oswalt, roughly 24 years younger than petitioner, corroborated that there was an "obvious difference" in how Chesnut treated them. 3 *id. at 82.* He stated that, although he and Chesnut "had [their] differences," "it was nothing compared to the way [Chesnut] treated Roger." *Ibid.* Oswalt explained that Chesnut "tolerated quite a bit" from him even though he "defied" Chesnut "quite often," but that Chesnut treated petitioner "in a manner, as you would . . . treat . . . a child when . . . you're angry with [him]." 3 *id. at 82-83.* Petitioner also demonstrated that, according to company records, he and Oswalt had nearly identical rates of productivity in 1993. 3 *id.* at 163-167; 4 *id.* at 225-226. Yet respondent conducted an efficiency study of only the

[*152] regular line, supervised by petitioner, and placed only petitioner on probation. 3 *id.* at 166–167; 4 *id.* at 229. Chesnut conducted that efficiency study and, after having testified to the contrary on direct examination, acknowledged on cross-examination that he had recommended that petitioner be placed on probation following the study. 4 *id.* at 197–199, 237.

Further, petitioner introduced evidence that Chesnut was the actual decisionmaker behind his firing. Chesnut was married to Sanderson, [***123] who made the formal decision to discharge petitioner. 3 *id.* at 90, 152. Although Sanderson testified that she fired petitioner because he had "intentionally falsified company pay records," 3 *id.* at 100, respondent only introduced evidence concerning the inaccuracy of the records, not their falsification. A 1994 letter authored by Chesnut indicated that he berated other company directors, who were supposedly his co-equals, about how to do their jobs. Pl. Exh. 7, *3 Record 108–112.* Moreover, Oswalt testified that all of respondent's employees feared Chesnut, and that Chesnut had exercised "absolute power" within the company for "as long as [he] can remember." 3 *id.* at 80.

In holding that the record contained insufficient evidence to sustain the jury's verdict, the Court of Appeals misapplied the standard of review dictated by Rule 50. Again, the court disregarded critical evidence favorable to petitioner — namely, the evidence supporting petitioner's prima facie case and undermining respondent's nondiscriminatory explanation. See *197 F.3d at 693–694.* The court also failed to draw all reasonable inferences in favor of petitioner. For instance, while acknowledging "the potentially damning nature" of Chesnut's age-related comments, the court discounted them on the ground that they "were not made in the direct context of Reeves's termination." *197 F.3d at 693.* And the court discredited petitioner's evidence that Chesnut was the actual decisionmaker by giving weight to the fact that

[*153] there was "no evidence to suggest that any of the other decision makers were motivated by age." *Id. at 694.* Moreover, the other evidence on which the court relied — that Caldwell and Oswalt were also cited for poor recordkeeping, and that respondent employed many managers over age 50 — although relevant, is certainly not dispositive. See *Furnco, 438 U.S. at 580* (evidence that employer's work force was racially balanced, while "not wholly irrelevant," was not "sufficient to *conclusively* demonstrate that [the employer's] actions were not discriminatorily motivated"). In concluding that these circumstances so overwhelmed the evidence favoring petitioner that no rational trier of fact could have found that petitioner was fired because of his age, the Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury's.

[***LEdHR2E] [2E] [***LEdHR12] [12]The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination. Given the evidence in the record supporting petitioner, we see no [**2112] reason to subject the parties to an additional round of litigation before the Court of Appeals rather than to resolve the matter here. The District Court plainly informed the jury that petitioner was required to show "by a preponderance of the evidence that his age was a determining and motivating factor in the decision of [respondent] to terminate him." Tr. 7 (Jury Charge) (Sept. 12, 1997). The court instructed the jury that, to show that respondent's explanation was a pretext for discrimination, petitioner had to demonstrate "1, that the stated reasons were not the real reasons for [petitioner's] discharge; *and* 2, that age discrimination was the real reason for [petitioner's] discharge." *Ibid.* (emphasis added). Given that petitioner established a prima facie case of discrimination, introduced enough evidence [***124] for the jury to reject respondent's explanation, and produced additional evidence of age-based animus, there was sufficient evidence for the jury to find that respondent had

[*154] intentionally discriminated. The District Court was therefore correct to submit the case to the jury, and the Court of Appeals erred in overturning its verdict.

For these reasons, the judgment of the Court of Appeals is reversed.

It is so ordered.

CONCURBY: GINSBURG

CONCUR:

JUSTICE GINSBURG, concurring.

The Court today holds that an employment discrimination plaintiff *may* survive judgment as a matter of law by submitting two categories of evidence: first, evidence establishing a "prima facie case," as that term is used in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973);* and second, evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false. Because the Court of Appeals in this case plainly, and erroneously, required the plaintiff to offer some evidence beyond those two categories, no broader holding is necessary to support reversal.

I write separately to note that it may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond these two categories in order to survive a motion for judgment as a matter of law. I anticipate that such circumstances will be uncommon. As the Court notes, it is a principle of evidence law that the jury is entitled to treat a party's dishonesty about a material fact as evidence of culpability. *Ante*, at 12. Under this commonsense principle, evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for its actions gives rise to a rational inference that the defendant could be masking its actual, illegal motivation. *Ibid.* Whether the defendant was in fact motivated by discrimination is of course for the finder of fact to decide; that is the lesson of *St. Mary's Honor Center v. Hicks, 509 U.S. 502, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993).* But the inference remains — unless it is conclusively

[*155] demonstrated, by evidence the district court is required to credit on a motion for judgment as a matter of law, see *ante*, at 15-16, that discrimination could not have been the defendant's true motivation. If such conclusive demonstrations are (as I suspect) atypical, it follows that the ultimate question of liability ordinarily should not be taken from the jury once the plaintiff has introduced the two categories of evidence described above. Because the Court's opinion leaves room for such further elaboration in an appropriate case, I join it in full.

REFERENCES: Return To Full Text Opinion

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45C Am Jur 2d, Job Discrimination 2729, 2730, 2822, 2823

29 USCS 621 et seq.; USCS Court Rules, *Federal Rules of Civil Procedure, Rule 50*

L Ed Digest, Civil Rights 78; Trial 205

L Ed Index, Age Discrimination

Annotation References:

Proving that discharge was because of age, for purposes of Age Discrimination in Employment Act *(29 USCS 621* et seq.). *58 ALR Fed 94.*

Construction and application of Age Discrimination in Employment Act of 1967 *(29 USCS 621* et seq.). *24 ALR Fed 808.*

LEXSEE 486 A 2D 798

Franklin B. STAGGS, et al. v. BLUE CROSS OF MARYLAND, INC., et al.

No. 538, September Term, 1984

Court of Special Appeals of Maryland

61 Md. App. 381; 486 A.2d 798; 1985 Md. App. LEXIS 294; 2 I.E.R. Cas. (BNA) 1018; 104 Lab. Cas. (CCH) P55,579

January 14, 1985

PRIOR HISTORY: [***1]
APPEAL FROM THE CIRCUIT COURT FOR BALTIMORE COUNTY, JAMES S. SFEKAS, JUDGE.

DISPOSITION:

JUDGMENT VACATED; CASE REMANDED TO CIRCUIT COURT FOR BALTIMORE COUNTY FOR TRIAL; APPELLEES TO PAY THE COSTS.

LexisNexis(R) Headnotes

COUNSEL:

Charles Lee Nutt, Baltimore, Maryland (Clements & Nutt, Baltimore, Maryland, on the brief), for appellants.

Harrison M. Robertson, Jr., Baltimore, Maryland (Michael Esher Yaggy and Niles, Barton & Wilmer, Baltimore, Maryland, on the brief), for appellees.

JUDGES:

Wilner, Adkins and Alpert, JJ.

OPINIONBY:

WILNER

OPINION:

[*384] [**799] Franklin B. Staggs, John E. Hyde, and Robert L. Mason, appellants here, are former employees of Blue Cross of Maryland, Inc. (Blue Cross). Staggs was hired in 1969; Hyde and Mason began their employment in 1972. They were each members of the sales staff, their duties being to call on potential customers to induce them to buy Blue Cross health plans. None of the appellants had a fixed contract or term of employment, although all were covered by certain personnel policies adopted by Blue Cross, as set forth in a 1975 policy memorandum.

During January and February, 1978, Blue Cross effected the termination of appellants' employment. Each was accused of falsifying [***2] his sales reports — *i.e.,* stating that he had made more customer calls than he actually made. Mason and Hyde were permitted to resign in lieu of dismissal; Staggs was actually dismissed.

In August, 1980, appellants filed this action in the Circuit Court for Baltimore County. In a two-count declaration, they charged Blue Cross with breach of contract (Count I) and five supervisory employees of Blue Cross with intentional and malicious interference with their employment agreement (Count II). The agreement sued upon, they averred, was "partly oral and partly in writing," the written part "being in the sole control of Blue Cross" and consisting of the policies and procedures set forth in the policy memorandum. The relevant portions of that memorandum, as revealed in subsequent pleadings and discovery documents, were as follows:

> "IV. Employees terminating due to dismissal are subject to the following conditions:
>
> > A. Except in extreme cases when dismissal will be immediate, employees will be given at least two formal counseling sessions by their supervisors and/or manager before final dismissal. All formal counseling sessions must be first reviewed with the Employment [***3] and Employee Relations Department prior to any discussion with the employee.

[*385] Formal counseling sessions with employees must be substantiated in writing by filing form 5.65 Problem Solving Report with the Employment and Employee Relations Department. During the second counseling session, the employee will be advised that continuance of [**800] the problem may result in dismissal. Failure to sign form 5.65, Problem Solving Report after it has been discussed, may provide grounds for immediate dismissal.

* * * * * *

E. An employee may be dismissed at any time for cause without liability to Blue Cross and Blue Shield of Maryland."

Upon completion of discovery, the court granted a motion for summary judgment filed by Blue Cross and denied a similar motion on the part of the individual defendants. After two false starts, appellants have filed a proper appeal from the court's entry of judgment for Blue Cross, n1 raising the following complaints:

> "The lower court erred in granting the Defendant Blue Cross' Motion for Summary Judgment for two reasons, first because there were abusive discharges of each plaintiff.
>
> The lower court erred in granting Defendant [***4] Blue Cross' Motion for Summary Judgment, second, because the Defendant's personnel policies respecting the termination of

[*386] employees became contractual obligations which Blue Cross violated."

n1. As explained in *Staggs v. Blue Cross of Maryland, Inc., 57 Md. App. 576, 471 A.2d 326 (1984),* appellants noted their first appeal in December, 1982. In March, 1983, realizing that there was no final judgment under Md.Rule 605a, they attempted to dismiss the appeal, but because the motion to dismiss was filed in the circuit court, no action was taken on the motion and the appeal remained extant. The circuit court then attempted to correct the jurisdictional problem by making a certification under Rule 605a, following which a second appeal was noted. We dismissed the appeal, however, on the ground that, due to the pendency of the first appeal, the circuit court's action was a nullity. Upon the receipt of our mandate, the circuit court again made a certification under Rule 605a, and this appeal ensued.

[***5]

Appellants do not deny that they did, in fact, submit false sales reports on a frequent, if not regular, basis. Nor do they deny that such actions were wrongful. The basis of their complaint is that they were directed by their supervisors to falsify those reports, and that they did so reluctantly. Through deposition testimony, appellants averred that Blue Cross had a requirement that sales representatives make six to seven sales calls each day, that they and other salesman complained to their supervisors that it was not possible to meet that requirement on a daily basis, and that they were told "if we couldn't make them, we should fudge them." They each objected to such a practice, but their objections were rejected. In accordance with the instruction thus given to them, they then began to add fictitious calls to their weekly sales reports in order to meet the six to seven calls per day requirement.

(1) *Abusive Discharge*

Appellants' first contention is grounded on *Adler v. American Standard Corp., 291 Md. 31, 432 A.2d 464 (1981).* They argue in their brief that "[t]he clear mandate of public policy is against supervision ordering employees to make false reports and [***6] then to discharge them for such activity." We need not address that issue. As noted, the sole claim made against Blue Cross was breach of contract. The tort of abusive discharge, recognized in *Adler,* was not pled below, and it is therefore not properly before us.

(2) *Breach of Contract*

The breach of contract claim requires some analysis. First, in terms of the "standing" of the individual appellants, Staggs, as we noted, was actually dismissed; Hyde and Mason resigned. Ordinarily, an employee who resigns cannot complain that his termination was improper; however, as we held in *Beye v. Bureau of National Affairs, 59 Md. App. 642, 477 A.2d 1197, cert. denied 301 Md. 639, 484 A.2d 274 (1984),* Maryland recognizes the concept

[*387] of constructive discharge. In a proper case, we said at 649, the law "will overlook the fact that a termination was formally effected by a resignation if the [**801] record shows that the resignation was indeed an involuntary one, coerced by the employer."

Although most of the discussion in *Beye* was in the context of a resignation allegedly prompted by dangerous working conditions, we in no way suggested that a constructive [***7] discharge could not arise from some other coercive setting. Indeed, we called attention to *Cumb. & Penn. R.R. Co. v. Slack, 45 Md. 161 (1876),* where the Court entertained a breach of contract action by an employee who resigned in response to a notice from the employer making clear that the employment was being terminated. The essential point made in *Slack* was more recently expressed in *Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54, 58-59 (1977):*

> "The fact of discharge . . . does not depend upon the use of formal words of firing. The test is whether sufficient words or actions by the employer would logically lead a prudent man [or woman] to believe his [or her] tenure had been terminated. . . . Employees are often asked to resign as opposed to being fired. While this may be done for any number of reasons, the meaning is clear that the employee is being dismissed."

That, in effect, is what Hyde and Mason allege here. Through deposition testimony, they averred that they were told by Blue Cross officials that the decision had been made to terminate their employment, that if they resigned they would be able to collect unemployment compensation [***8] benefits, but if they were discharged those benefits would be unavailable. Both claimed that they resigned only in response to that inducement, which inducement, in fact, turned out to be false.

The record extract does not indicate that Blue Cross ever denied these allegations of Hyde and Mason. Even if it did, there would, at the very least, be presented an issue of material fact that could not be decided on summary judgment.

[*388] If these averments are true, the terminations of Hyde's and Mason's employment would amount to constructive discharges; their resignations could be regarded as nothing more than coerced responses to decisions already made by Blue Cross and communicated to them. We therefore conclude, upon the record before us and for purposes of summary judgment, that all three appellants have established sufficient standing to claim that they were, in fact, discharged by Blue Cross.

We next must consider the nature of the employment agreement alleged by them.

In *Adler v. American Standard Corp., supra, 291 Md. 31, 35, 432 A.2d 464* the Court reaffirmed the common law rule that "an employment contract of indefinite duration, that is, at will, can be legally [***9] terminated at the pleasure of either party at any time." That but begs the issue, however. The question is whether the contracts in dispute here, which are otherwise of indefinite duration, have been so modified by the personnel policy statement as to remove them from the full strictures of the common law rule. As was said in *Hodge v. Evans Financial Corp., 228 U.S. App. D.C. 161, 707 F.2d 1566, 1568 (D.C.Cir. 1983),*

> "Though the classic assumption of the law is that the parties intend a contract of indefinite term to be terminable at will, basic principles of contract law inform us that the parties can contract otherwise. The controlling factor is the intent of the parties with respect to the terms of the contract. . . ."

There has been a great deal of litigation in recent years, throughout the country, over the effect of personnel handbooks and other types of policy statements issued by employers on "at will" employment agreements. Although there has yet to develop any uniform rule and the decisions vary somewhat, depending on the type of provision sought to be enforced and the theory pled by the employee, most of the more recent decisions seem to reflect the [***10] view that such unilateral pronouncements by an employer may create legally enforceable expectations on the part of its employees.

[*389] [**802] Perhaps the best exposition of this view is found in *Toussaint v. Blue Cross & Blue Shield of Mich., 408 Mich. 579, 292 N.W.2d 880, 892 (1980).* The Court there began by confirming the general rule that indefinite hirings are terminable at the will of either party. It noted, however, that,

> "While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly."

Id., 292 N.W.2d at 892. In adopting such policies, said the Court, the employer has "created a situation 'instinct with an obligation.'" *Id.* Thus, it continued,

> "We hold that employer statements of policy, such as the Blue Cross Supervisory Manual and Guidelines, can give rise to contractual rights in employees [***11] without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee, and . . . [even though] the statement of policy is signed by neither party, can be unilaterally amended by the employer without notice to the employee, . . . contains no reference to a specific employee, his job description or compensation, . . . no reference was made to the policy statement in pre-employment interviews[,] and the employee does not learn of its existence until after his hiring."

Id.

From this, the Court concluded that where the employer "had established a company policy to discharge for just cause only, pursuant to certain procedures, had made that policy known to Toussaint, and thereby had committed itself to discharge him only for just cause in compliance with the procedures," *id.,* a jury could find that "[a]lthough Toussaint's employment was for an indefinite term . . . the

[*390] relationship was not terminable at the will of Blue Cross." *Id.*

Essentially the same principle was espoused by the Supreme Court of Minnesota in *Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983).* There, too, the [***12] question was whether a personnel handbook, which in that case touted the "job security" offered by the employer and set forth a specific "disciplinary policy," sufficed to limit the otherwise broad discretion of the employer to discharge an employee without a fixed term of employment. The issue was one of contract law — whether the handbook represented the offer of a unilateral contract that was accepted by the employee.

Although recognizing that "[a]n employer's general statements of policy are no more than that and do not meet the contractual requirements for an offer," the Court concluded that "[a]n employer's offer of a unilateral contract may very well appear in a personnel handbook. . . . By preparing and distributing its handbook, the employer chooses, in essence, either to implement or modify its existing contracts with all employees covered by the handbook." *Id., 626, 627.* In the particular case, the Court held that the precatory language in the handbook regarding "job security" did not suffice to create a permanent employment, but that the specific provisions on disciplinary procedures, requiring reprimands and an opportunity to correct the perceived deficiencies, [***13] *were* contractually binding. Thus, the Court concluded that "the bank breached its employment contract with Mettille by not affording him the job termination procedures of its handbook. . . ." *Id., 631.*

See also Brooks v. Trans World Airlines, Inc., 574 F. Supp. 805 (D.Colo. 1983); Carter v. Kaskaskia Community Action Agency, 24 Ill. App. 3d 1056, 322 N.E.2d 574 (1974); Shah v. American Synthetic Rubber Corp., 655 S.W.2d 489 (Ky. 1983); Arie v. Intertherm, Inc., 648 S.W.2d 142 (Mo.App. 1983); Forrester v. Parker, 93 N.M. 781, [**803] *606 P.2d 191 (1980); Hammond v. North Dakota State Personnel Bd., 345 N.W.2d 359 (N.D. 1984); Langdon v. Saga*

[*391] *Corp., 569 P.2d 524 (Okla.App. 1977); Yartzoff v. Democrat-Herald Pub. Co., Inc., 281 Ore. 651, 576 P.2d 356 (1978); Osterkamp v. Alkota Mfg., Inc., 332 N.W.2d 275 (S.D. 1983); Hamby v. Genesco., Inc., 627 S.W.2d 373* (Tenn.App.), *app. denied* (1982); *Piacitelli v. Southern Utah State College, 636 P.2d 1063 (Utah 1981);* and *cf. Griffin v. Erickson, 277 Ark. 433, 642 S.W.2d 308 (1982). See also Vinyard v. King, 728 F.2d 428 (10th Cir. 1984),* and *Conley v. Board of Trustees* [***14] *of Grenada County Hosp., 707 F.2d 175 (5th Cir. 1983),* concluding that termination provisions in a personnel handbook can give an employee for indefinite term a property interest in continued employment for purposes of an action under *42 U.S.C. § 1983.*

Not all courts have adopted this view. Some have rejected the theory of a fluid offering of a unilateral novation or amendment to the employment agreement and held flatly that an employee handbook, especially one distributed after an employee is hired, does not become part of that employee's contract. *See Beidler v. W.R. Grace, Inc., 461 F. Supp. 1013 (E.D.Pa. 1978), aff'd 609 F.2d 500 (3d Cir. 1979),* applying Pennsylvania law; *Uriarte v. Perez-Molina, 434 F. Supp. 76 (D.D.C. 1977); White v. Chelsea Industries; Inc., 425 So. 2d 1090 (Ala.1983); Muller v. Stromberg Carlson Corp., 427 So. 2d 266 (Fla.App. 1983); Johnson v. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976); Gates v. Life of Montana Ins. Co., 196 Mont. 178, 638 P.2d 1063 (Mont. 1982); Edwards v. Citibank, N.A., 100 Misc. 2d 59, 418 N.Y.S.2d 269 (N.Y.Co. 1979); Richardson v. Charles Cole Memorial Hosp., 320 Pa. Super. 106,* [***15] *466 A.2d 1084 (1983);* and *cf. Terrio v. Millinocket Community Hospital, 379 A.2d 135 (Me. 1977).*

The Maryland Court of Appeals addressed one aspect of the issue in *Dahl v. Brunswick Corp., 277 Md. 471, 356 A.2d 221 (1976).* Several former employees of Brunswick, who had neither written employment contracts nor a collective bargaining agreement, sued to recover severance and vacation pay allegedly provided for in a Policies and Procedures Manual issued by the employer. The first question

[*392] considered by the Court was "whether Brunswick's severance pay policy statement became part of the employment contract between it and its employees." *Id., 277 Md. at 475, 356 A.2d 221.* As to that, the Court noted that "Brunswick concedes, *as it should,* that its policy directive with respect to severance pay constituted an offer of a unilateral contract of which the employees were aware and, by continuing to work for Brunswick, accepted." (Emphasis added.) *Id.* "[T]here is abundant support," the Court added, "for the proposition that employer policy directives regarding aspects of the employment relation become contractual obligations when, with knowledge of their existence, [***16] employees start *or continue* to work for the employer." (Emphasis added.) *Id., 277 Md. at 476, 356 A.2d 221.*

Blue Cross seeks to distinguish *Dahl* on a number of bases, most having to do with what it perceives the facts in this case to be. In terms of legal theory, there can be little doubt that the Court of Appeals has aligned itself with what appears to be the majority rule. We can see no substantial difference, in this regard, between provisions in a handbook or personnel policy statement affording post-termination benefits, such as severance pay, and those affording pre-termination benefits, such as requiring that termination be for cause or setting forth a prerequisite mechanism for rehabilitating a deficient employee.

Accordingly, we hold that provisions in such policy statements that limit the employer's discretion to terminate an indefinite employment or that set forth a required procedure for termination of such employment may, if properly expressed and communicated to the employee, become contractual undertakings by the employer that are enforceable by the employee. In [**804] so holding, we caution that not every statement made in a personnel handbook [***17] or other publication will rise to the level of an enforceable covenant. As the Minnesota Court observed in *Pine River State Bank, supra, 333 N.W.2d at 626,* "general statements of policy are no more than that and do not meet the contractual requirements for an offer."

[*393] The circuit court gave no reasons for its decision to grant Blue Cross's motion for summary judgment. To warrant the entry of such judgment, the record would have to establish, as a matter of law, that (1) Hyde and Mason were not constructively discharged, or (2) applying the reasoning set forth above, the specific provisions of the 1975 policy memorandum dealing with termination did not constitute contractual undertakings, or (3) those provisions, even if contractual in quality, were complied with. The record establishes none of these predicates, as a matter of law. From what is before us, it would seem that Hyde and Mason were, in fact, constructively discharged. The extent to which the termination provisions in the policy memorandum were made known to the appellants and were intended by Blue Cross to govern employee terminations is not altogether clear. Finally, the important question of whether, [***18] in light of the instructions allegedly given to appellants by their supervisors, their terminations were for "cause" is a matter upon which reasoning minds might differ.

It is therefore clear that summary judgment was inappropriate. The basic underlying factual issues must be tried.

JUDGMENT VACATED; CASE REMANDED TO CIRCUIT COURT FOR BALTIMORE COUNTY FOR TRIAL; APPELLEES TO PAY THE COSTS.

LEXSEE 1986 US DIST LEXIS 24884

Robert J. Weir and Kyle H. Sibinovic Plaintiffs, v. Litton Bionetics, Inc. Defendant

Civil No. H-85-2545

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

1986 U.S. Dist. LEXIS 24884; 41 Fair Empl. Prac. Cas. (BNA) 1150

May 29, 1986, Decided

LexisNexis(R) Headnotes

OPINIONBY: [*1]

HARVEY

OPINION:

MEMORANDUM AND ORDER

ALEXANDER HARVEY, Chief, United States District Judge.

Presently pending in this civil action are the following motions:

1. Motion of defendant for severance;

2. Motion of plaintiff Sibinovic for partial summary judgment;

3. Motion of defendant for summary judgment as to claims of plaintiff Sibinovic; and

4. Motion of defendant for summary judgment as to claims of plaintiff Weir.

Voluminous memoranda in support of and in opposition to these motions have been filed by the parties and carefully reviewed by the Court. the partis have likewise filed affidavits, exhibits, and deposition excerpts in support of their respective positions. A hearing on these pending motions has been held in open Court. For the reasons to be stated herein, the motion of plaintiff Sibinovic for partial summary judgment will be denied, both motions of the defendant for summary judgment will be denied in part and granted in part, and defendant's motion for severance will be granted.

In this civil action, two separate plaintiffs are seeking recoveries from the same defendant, Litton Bionetics, Inc. (hereinafter "Litton"). Claims are asserted under (1) the Age Discrimination

[*2] in Employment Act (the "ADEA"), *29 U.S.C. §§ 621* et seq. (2) the Employee Retirement Income Security Act ("ERISA"), *29 U.S.C. §§ 1001* et seq., and (3) the common law of Maryland. Following the entry of a Scheduling Order, the parties engaged in extensive discovery, including the taking of numerous depositions.

I

The Facts

The two plaintiffs, Dr. Robert J. Weir and Dr. Kyle H. Sibinovic, are scientist who for many years were employed by Litton. Plaintiff Weir has a doctorate degree in physiology and plaintiff Sibinovic has a doctorate degree in microbiology. During the times relevant to this civil action, Litton was engaged in the business of scientific evaluation and testing in the fields of medical research and life science. The claims pressed by the plaintiffs here arise as a result of Litton's termination at different times in 1984 of the employment of each of the plaintiffs.

At the time that each plaintiff was terminated, Litton was conducting its business through four separate operating divisions. Each division undertook a different portion of the life science and medical testing work of Litton. Plaintiff Sibinovic went to work for Litton in 1967, and was terminated

[*3] on December 31, 1984 when she was 48 years of age. At the time of her termination, plaintiff Sibinovic worked in the Medical Laboratory Division (also known as Bionetics Medical Laboratories or BML), with headquarters in Kensington, Maryland. Plaintiff Weir came to work for Litton in 1969. The date of his termination was September 28, 1984. At that time he was 60 years of age, was working at the Applied Science Division (the "ASD"), which included the Biologic Safety Evaluation Directorate (the "BSED"), and which was principally located in Kensington and Rockville, Maryland.

Plaintiff Sibinovic reported to Dr. Jacob Jurmain, Vice President of the Medical Laboratory Division. Dr. Weir (who at one time had been general manager of BSED) reported to Dr. David Brusick, the general manager of BSED at the time of Dr. Weir's termination.

Both plaintiffs assert that they were terminated because of their age, in violation of the ADEA. Both also allege that Litton, in January of 1985, commenced a supplemental pension program, that they were terminated immediately before the plan was made available to Litton employees and that, in violation of ERISA, the purpose of the termination was to reduce

[*4] defendant's pension costs. finally, both plaintiffs, relying on *Staggs v. Blue Cross of Maryland, Inc., 61 Md. App. 381,* cert. denied, *303 Md. 295 (1985),* assert that defendant in terminating the employment of each plaintiff was guilty of a breach of contract.

II

The Applicable Legal Principles

The Court will first review the principles which apply in this Circuit insofar as the granting or denial or a motion for summary judgment is concerned. In *Phoenix Savings & Loan, Inc. v. Aetna CAsualty Company, 381 F.2d 245, 249 (4th Cir. 1967),* the fourth Circuit Court of Appeals summarized these principles as follows: "It is well settled that summary judgment should not be granted unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and established affirmatively that the adverse party cannot prevail under any circumstances."

Under *Rule 56, F.R.Civ.P.*, the burden is on the party moving for summary judgment to demonstrate clearly that there is no genuine issue of fact and any doubt as to the existence of a factual issue is to be resolved against the movant. *Phoenix Savings & Loan, Inc., supra.* Hence, the party opposing

[*5] a motion for summary judgment is entitled to all favorable inferences which can be drawn from the evidence. *Cram v. Sun Life Ins. Office. Ltd., 375 F.2d 670, 674 (4th Cir. 1967).* In *Kirkpatrick v. Consolidated Underwriters, 227 F.2d 228 (4th Cir. 1955),* the Court repeated its holding in *Pierce v. Ford Motor Co., 190 F.2d 910, 915 (4th Cir. 1951),* that summary judgment under rule 56 should be granted only where is is perfectly clear that no genuine issue of act is involved and inquiry into the facts is not desirable to clarify the application of the law.

More recently, the Fourth Circuit has emphasized that summary judgment is seldom appropriate in cases in which particular states of mind are decisive as element of a claim of a defense. *Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979).* In *Morrison v. Nissan, Ltd., 601 F.2d 139, 141 (4th Cir. 1979),* the Fourth Circuit further explained that when the disposition of a case turns on a determination of intent, a trial court must be especially cautious in granting summary judgment, since the resolution of that issue depends so much on the credibility of the witnesses which can best be determined by the

[*6] trier of fact after observation of the demeanor of the witnesses during direct and cross-examination. See also, 10A Wright, Miller and Kane, Federal Practice and Procedure, Civil § 2730 (2d ed. 1983).

The legal principles which apply in an ADEA case of this sort are well know. The *McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)* tests have been modified and adapted for use in an ADEA case. See *Wilhelm v. Blue Bell, Inc., 773 F.2d 1429, 1432 (4th Cir. 1985)*. AS the first step, the plaintiff is required to carry the burden of proving a prima facie case. *Lovelace v. Sherwin Williams Co., 681 F.2d 230 (4th Cir. 1982)*. If the plaintiff satisfies this initial requirement, the burden then shifts to the defendant to produce evidence that plaintiff was disfavored for legitimate nondiscriminatory reasons for the action taken. *Lovelace, 681 F.2d at 239*. But that is not the end of the inquiry which a trial court should undertake, because an otherwise valid reason advanced by the employer may be used as a pretext for the action taken. McDonnell Douglas Corp., supra at 804-805. If the employer has carried its burden under the second step, a plaintiff can

[*7] still prevail if he (she) can prove by a preponderance of the evidence that age was a determining factor in the sense that "but for" the employer's motive to discriminate he (she) would not have been discharged. *Lovelace, supra at 243; Fink v. Western Electric Co., 708 F.2d 909, 914-915,* (4th cir. 1983).

III

Defendant's Motions for Summary Judgment — the ADEA Claims

Applying these principles to the facts disclosed by the extensive record in this case, this Court concludes that the ADEA claim of each plaintiff cannot be resolved in defendant's favor by way of summary judgment. Conflicting inferences arise form the facts.

On the record presently before the Court, it would appear that each plaintiff will have a difficult time in persuading the jury that his or her rights under the ADEA have been violated by the defendant. But even if it would appear to a court that a directed verdict would be entered at the close of a plaintiff's case, summary judgment is not appropriate if there are disputed inferences as to material facts. Here such disputes exist concerning defendant's motive and intent insofar as each of these two plaintiffs is concerned. As the Fourth Circuit

[*8] has held, issues or intent cannot be readily resolved pursuant to a motion for summary judgment. At the very least, full development of the facts at trial is necessary to clarify the proper application of the law. At trial, it will be for the jury to assess the credibility of the witnesses and the weight their testimony deserves.

Defendant concedes that plaintiff Sibinovic can satisfy the first two McDonnell Douglas criteria. But defendant argues that plaintiff Sibinovic cannot show that she was satisfactorily performing her job. This issue cannot be decided as a matter of law on the present record. When the evidence is viewed in a light favorable to the plaintiff Sibinovic, an inference can be drawn that she was qualified to do the work she was going when she was discharged and that she was performing her job satisfactorily.

When the second step of McDonnell Douglas is addressed, it is apparent that defendant has indeed articulated, as to each plaintiff, a legitimate nondiscriminatory reason for the employment action taken. Fur budget reasons, costs reduction steps were taken by Litton in late 1984. These steps included the termination of each plaintiff. Defendant has advanced

[*9] these reductions in force (or RIFs) as legitimate reasons for discontinuing the employment of both plaintiff Sibinovic and plaintiffs Weir.

The key issue insofar as the claim of each plaintiff is concerned is whether each employment action would not have been taken but for the employer's motive to discriminate. Where an issue of this sort is presented, questions of motive and intent quite obviously are presented. As noted, summary judgment is seldom appropriate in cases in which a particular state of mind is decisive as an element of a claim. See *Charbonnages de France v. Smith, supra* and *Morrison v. Nissan, Ltd., supra.*

Although conceding that several Litton employees including Dr. Jurmain critcized her, plaintiff Sibinovic asserts that these criticisms were not supported by the facts and were therefore pretextual. Plaintiff Weir disputes the negative evaluations of this work in the BSED submitted by an outside consultant, asserting that Dr. Brusick relied upon such evaluations as a pretext for termination him. When the record here is considered in its totality, this Court concludes that there are conflicting inferences which cannot be resolved by way of a motion

[*10] for summary judgment as to whether or not these terminations were pretextual.

For these reasons, defendant's motions for summary judgment addressed to plaintiffs' ADEA claims will be denied.

IV

Defendant's Motions for Summary Judgment — the ERISA Claims

Plaintiffs also allege that their termination violate Section 510 of ERISA, *29 U.S.C. § 1140.* Section 510 states in pertinent part:

It shall be unlawful for any person to discharge a . . . participant . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . .

At the time of their terminations, both plaintiffs had vested interest in defendant's employee pension plan as it then existed. This plan was covered by the provisions of ERISA.

Subsequent to plaintiffs' terminations, defendant sought to improve its pension system by offering a supplemental plan which allowed defendant's employees to contribute additional funds toward retirement, funds which would be matched by contributions form defendant. This supplemental plan went into effect on January 1, 1985. To become vested in this supplemental plan, a Litton employee would have to contribute

[*11] to the supplemental plan for three years.

Plaintiffs assert that defendant terminated their employment; (1) in order to interfere with plaintiffs' further accrual of benefits under Litton's original pension plan, and (2) in order to interfere with plaintiffs' attaining rights to payment under the supplemental pension plan which came to life on January 1, 1985.

Assuming without deciding that plaintiffs would not be required to exhaust appropriate administrative remedies before asserting these ERISA claims in this civil action, these claims must in any event be dismissed. Plaintiffs' contentions in support of their ERISA claims cannot be supported by the facts of record here.

A terminated employee cannot recover from his former employer under Section 510 unless the former employer establishes that his termination was effected by the employer to prevent the vesting of the employee's pension rights. *West v. Butler, 621 F.2d 240, 245 (6th Cir. 1980).* In this case, plaintiffs cannot possibly seek a recovery under Section 510 based on Litton's original pension plan since both plaintiffs were vested in that plan at the time of their terminations.

Plaintiffs' claims concerning the supplemental

[*12] pension plan are likewise without support in this record and must also be dismissed First, neither plaintiff was ever a participant in the supplemental plan. Accordingly, their terminations could hardly under Section 510 be related to the discharge of a "participant" for the purpose of "interfering with the attainment of . . . [a] right" under the supplemental pension plan.

Secondly, plaintiffs were terminated well before they or their supervisors knew any of the details of the supplemental plan. Since both plaintiffs received their termination notices several months before the new plan took effect, no one at Litton (except perhaps for those in the Department of Personnel responsible for developing and implementing the plan) knew about the particulars of the plan and what effect the plan might have on Litton's labor costs at the time plaintiffs were terminated.

Thirdly, and perhaps most important of all, Dr. Jurmain did not know the pension status of plaintiff Sibinovic at the time Sibinovic was terminated, nor did Dr. Brusick have such knowledge insofar as the pension statu of plaintiff Weir was concerned. If these supervisors did not know to the plaintiffs' pension status at

[*13] the time plaintiffs were terminated, they hardly could have been motivated to act as they did because plaintiffs were then participants in Litton's existing pension plan or because plaintiffs hoped to participate in Litton's new pension plan.

Under these circumstances, the Court concludes that plaintiffs cannot as a matter of law prevail as to their claims based on violations by defendant of ERISA. Defendants motions for summary judgment directed to plaintiffs' ERISA claims will therefore be granted.

V

The Motions for Summary Judgment Addressed to the Contract Claims

Both plaintiffs seek recoveries based on allegations of a breach by defendant of contracts of employment. Under Maryland law, a policy statement which limits the employer's discretion to terminate an indefinite employment or which sets forth a required procedure for termination of such employment may, if properly expressed and communicated to the employee, become a contractual undertaking by the employer that is enforceable by the employee. *Staggs v. Blue Cross of Maryland, supra;* see also, *Dahl v. Brunswick Corporation, 277 Md. 471 (1976).*

Plaintiff Sibinovic has moved for partial summary judgment

[*14] arguing that the facts established as matter of law that defendant breached such a contractual undertaking. Defendant in turn has moved for summary judgment asserting that the facts establish as a matter of law neither plaintiff can prove the existence of such a contract of employment all three of the motions for summary judgment or partial summary judgment addressed to this issue must be denied.

Questions presented include whether the employment policy in question was adequately set forth and whether it was communicated to the affected employees. Plaintiffs asset that Litton breached its contractual obligations to them by violating two separate provisions of its reduction i force policy, namely (1) the requirement that senior employees be retained where qualifications were equivalent and (2) the requirement that employees terminated due to RIF be given preference for future vacancies for which they might qualify. Whether or not the plaintiffs' qualifications were equivalent to those of other employees is an issue likewise raised by plaintiffs' ADEA claims. On the record here, there are inferences which support both plaintiffs' and defendant's positions concerning these questions.

[*15] Accordingly, it will be for the trier of fact to determine whether defendant has breached a contract of employment existing between it and plaintiff Sibinovic and between it and plaintiff Weir.

For these reasons, the motion for partial summary judgment of plaintiff Sibinovic will be denied, and the motions for summary judgment of defendant addressed to plaintiff's contract claims will likewise be denied.

VI

Severance

Defendant Litton has moved to sever the trial of the claims of plaintiff Weir from the trial of the claims of plaintiff Sibinovic. On the record here, this Court concludes that a severance of these claims should be granted.

Rule 20(a), F.R.Civ.P., permits different persons to join in on action if they assert a right to relief in respect of or arising out to the same transactions, occurrence, or series of transactions or occurrences, and if any question of law or fact common to these persons arise in the action. These plaintiffs have not met the requirement of Rule 20(a).

Although both plaintiffs rely on the same legal theories, the facts that pertain to the claim of each are quite different. Plaintiff Sibinovic was terminated on December 31, 1984, at which time

[*16] she was 48 years of age. Plaintiff Weir was terminated on September 28, 1984, at which time he was 60 years of age. Each plaintiff was employed by a different division of Litton. Plaintiff Weir worked in the BSED. The decision to terminate Sibinovic was made by Dr. Jacob Jurmain. Weir was terminated by Dr. David Brusick. Litton's divisions were operated independently of each other with virtually no interchange of personnel. After the two plaintiffs were terminated, Litton sold each of its four division. Hazleton Laboratories purchased BSED, while Metpath, Inc. purchased BML.

This Court concludes that it would be prejudicial to defendant were the claims of plaintiff Weir and the claims of plaintiff Sibinovic to be tried at the same time. The work history of each plaintiff was quite different, and that claims and defenses of each can be fairly considered only in the light of the separate work history of each. Were this case to be tried without a jury , a judge might well be able to consider the pertinent facts separate and fairly. However, plaintiffs' claims will be tried before a jury, and it is highly likely that confusion will result when the different facts pertaining to these different

[*17] claims are presented at a single trial. No prejudice can result to each plaintiff if each claim is tried separately, but the same cannot be said insofar as the defendant is concerned. This Court concludes that in view of the different facts which are pertinent to each of these two claims, defendant would suffer prejudice if the claims were tied together.

A similar result was reached in *Smith v. North American Rockwell Corp., 50 F.R.D. 515 (N.D. Okla. 1970)*. In that case, the claims of four plaintiffs were severed in a case in which all four had sued the same employer alleging race discrimination. As in this case, the Court noted that the allegedly discriminatory decisions had been made by different supervisors. As the Court said *(50 F.R.D. at 522)*:

Moreover, litigation [of the claims jointly] . . . would inevitably focus in detail on the separate work histories of each plaintiff. On its face it would be practically impossible to litigate fairly and efficiently in one lawsuit all of the factual and legal issues which the present plaintiffs seek to raise.

to the same effect, see also, *Martinez v. Safeway Stores, Inc., 66 F.R.D. 446 (N.D. Calif. 1975)*.

For all these

[*18] reasons, this Court concludes that defendant's motion for a severance should be granted. Although both plaintiffs have presented claims based upon the same general theories of law, each claim is based on a discrete factual situation. Plaintiffs had different jobs in different divisions, and each had little knowledge of the other's day-to-day performance. Indeed, it is doubtful that the testimony of plaintiff Sibinovic would be relevant and admissible at the trial of the claims of plaintiff Weir, and vice versa. Accordingly, separate trials will be held.

For the reasons states, it is this 29th day of May, 1986, by the United States District Court for the District of Maryland ,

ORDERED:

1. That the motion of defendant for summary judgment as to the claims of plaintiff Sibinovic be and the same is hereby granted in part and denied in part;

2. That the motion of defendant for summary judgment as to the claims of plaintiff Weir be and the same is hereby granted in part and denied in part;

3. That the motion of plaintiff Sibinovic for partial summary judgment be and the same is hereby denied; and

4. That the motion of defendant for severance be and the same is hereby granted.